

IN THE SUPREME COURT, STATE OF WASHINGTON
92085-1

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SETH BURRILL PRODUCTIONS INC. Plaintiff-Respondent

V.

REBEL CREEK TACKLE INC., Defendant-Appellant

DEFENDANT-APPELLANT REBEL CREEK TACKLE INC.'S REPLY TO
PLAINTIFF-RESPNDENT'S ANSWER TO PETITION FOR REVIEW

Respondent/Plaintiff
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TABLE OF CONTENTS

IDENTITY OF APPELLANT	1
DECISIONS	1
RESPONDENT ISSUES NOT RAISED BY	
APPELLANT	1
1.First Issue	1
2.Second Issue	2
3.Third Issue	2
4.Fourth Issue	2
5.Fifth Issue	2
6.Sith Issue	2
ARGUMENT RE: RESPONDENT’S ISSUES	3
1.Regarding Issue 1.	3
2. Regarding issue 2.	4
3. Regarding issue 3	5
4. Regarding issue 4	5
5. Regarding issue 5	6
6. Regarding issue 6.	6
ARGUMENT RE: CONTRACT CONSTRUCTION	
AND AMBIGUITY RAISED BY RESPONDENT’S	
ISSUE 6	6
ABUSE OF DISCRETION	9

CONCLUSION

13

TABLE OF AUTHORTIES – CITED CASES

<i>Berg v. Hudesman</i> , 115 Wash.2d 657, 663, P.2d 222 (1990)	4, 5, 12
<i>Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd.</i> , 124 P.3d 640, 156 Wn.2d 131 (Wash. 2005), n. 6	1
<i>Graves v. Duerden</i> , 754 P.2d 1027, 51 Wn.App. 642, 647-8 (Wash.App. Div. 3 1988)	8
<i>In re Marriage of Davisson</i> , 126 P.3d 76, 131 Wn.App. 220, 226 (Wash.App. Div. 3 2006)	7
<i>In re Marriage of Humphreys</i> , 903 P.2d 1012, 79 Wn.App. 596, 599 (Wash.App. Div. 3 1995)	8
<i>International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n</i> , 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967)	8
<i>Johnston v. Beneficial Management Corp. of Am.</i> , 96 Wash.2d 708, 713-14, 638 P.2d 1201 (1982)	7, 8
<i>Mead School Dist. No. 354 v. Mead Educ. Ass'n</i> , 85 Wn.2d 278, 280, 534 P.2d 561 (1975)	9
<i>Moeller v. Farmers Ins. Co. of Washington</i> , 267 P.3d 998, 173 Wn.2d 264, 280-81 (Wash. 2011)	12
<i>Roberts v. Dudley</i> , 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000).	4, 5, 6
<i>Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.</i> , 120 Wn. 2d 573, 580, 844 P.2d 428 (1993).	4, 5, 12
<i>State v. Barry</i> , 339 P.3d 200 (Wash.App. Div. 3 2014)	12
<i>State v. Coe</i> , 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984)	9
<i>State, Dept. of Ecology v. Tiger Oil Corp.</i> , 271 P.3d 331, 166 Wn.App. 720 (Wash.App. Div. 2 2012)	8
<i>State Farm Mut. Auto. Ins. Co. v. Avery</i> , 57 P.3d 300, 114 Wn.App. 299, 311 (Wash.App. Div. 3 2002).	6, 12
<i>State v. International Typographical Union</i> , 57 Wn.2d 151,	

158, 356 P.2d 6 (1960)	8
<i>State v. Tharp</i> , 27 Wn.App. 198, 206, 616 P.2d 693 (1980)	13
<i>Wilson v. Horsley</i> , 974 P.2d 316, 137 Wn.2d 500, 505 (Wash. 1999)	12

TABLE OF AUTHORTIES – COURT RULES

RAP 13.4(d)	1
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TABLE OF AUTHORTIES – TREATISES

17 C.J.S. Contempt § 12 (1963)	8
--------------------------------	---

IDENTITY OF APPELLANT

The Defendant/Appellant Rebel Creek Tackle Inc. Replies to Respondent's Answer.

The Reply is limited by Rule 13.4(d) to new issues raised by Respondent but not raised by Appellant in the Petition for Review. A party may file a reply brief to the opposing party's answer to a petition for review only if the answer has raised new issues not addressed in the original petition. RAP 13.4(d). *Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd.*, 124 P.3d 640, 156 Wn.2d 131 (Wash. 2005), n. 6

DECISIONS

Division III of the Court of Appeals issued its opinion on July 7, 2015, No. 32119-3-III. The Appellant filed its Petition for Review on August 6, 2015. The Respondent filed its Answer to the Petition for Review on September 8, 2015. The Appellant filed its Reply on October 5, 2015 as allowed by the grant of a Motion for Extension.

ISSUES NOT RAISED IN THE PETITION FOR REVIEW

1. First Issue - Respondent's Answer at p 3-4 raises the issue that the plastic injection molding company, PIM, participated in Rebel Creek Tackle Inc.'s (hereafter RCTI) material breach of the Contract. This issue was not raised by Appellant.

2.Second Issue - Respondent's Answer at 4 raises the issue that RCTI did not timely file any appeal of the arbitrator's decision. This issue was not raised by Appellant.

3.Third Issue – Respondent's Answer at 5 raises the issue that RCTI did not appeal the Spokane County Court Order of June 7, 2013. This issue was not raised by Appellant.

4.Fourth Issue – Respondent's Answer at 4-5 raises the issue that SBPI fully understood, on June 7, 2014, that the ownership of the molds remained with RCTI, and that this court order merely dictated possession of the molds which enabled SBPI to chose a different manufacturer. This issue was not raised by Appellant.

5.Fifth Issue – Respondent's Answer at 6 raises the issue that Seth Burrill Production Inc. (hereafter SBPI) has never received any monetary satisfaction of the judgment or award of attorney fees. This issue was not raised by Appellant.

6.Sixth Issue – Respondent's Answer at 7 raises the issue that RCTI has appealed from a Finding of Contempt. This issue was not raised by

Appellant.

ARGUMENT

1.Regarding Issue 1. The Respondent, at RA 3-4, asserts that PIM, the plastic injection molding company, participated in RCTI's material breach of the Contract. SBPI's Response to RCTI's Brief on Appeal to the Court of Appeals, at 17-18, alluded to the same issue stating:

“The arbitrator was aware that RCT and PIM had colluded to breach SBPI's exclusive license ...and thus understood that the molds needed to be transferred to SBPI to ensure that this activity would not occur again. RP 242. This extrinsic evidence provides substantial support for the collusion that the words are unambiguous, as the Trial Court correctly found.”

SBPI cited Report of Proceedings 242 (hereafter RP). The reference to ‘collusion’ is found only in SBPI's Demand For Arbitration Clerk's Papers 188 (hereafter CP) at paragraphs 15- 22, CP190-193 and in SBPI's briefing in this matter. There was no ruling by the Arbitrator (CP 76-80) and no reference to collusion by the Trial Court and Judge Clark in argument or in the Order of November 15, 2013 appealed from herein.

The Supreme Court will find that RP 242 is an excerpt from a SBPI memorandum commencing at RP 240 but will also find that there is no record on appeal to support Respondent's issue of “collusion” between RCTI and PIM. This is not proper briefing before this court. See RAP 13.4(d) "A party may file an answer to a petition for review. If the party

wants to seek review of any issue which was not raised in the petition for review that party must raise that new issue in an answer." *Roberts v. Dudley*, 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000). The Supreme Court should decline to consider this issue.

However, there is significance in Respondents raising of this unsupported allegation. Respondent's contention that there was collusion constitutes an issue of the character of those elements to be considered "under all the circumstances" when conducting a proper contract construction and ambiguity analysis. *Berg v. Hudesman*, 115 Wash.2d 657, 663, P.2d 222 (1990); *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn .2d 573, 580, 844 P.2d 428 (1993).

2. Regarding issue 2.- RCTI did not appeal the Arbitrator's Decision. The issue is not briefed and Respondent does not refer the Court to any support in the Record on Appeal for this contention. This is not proper briefing before this court. See RAP 13.4(d). *Roberts v. Dudley*, 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000). The Supreme Court should decline to consider this issue.

3.Regarding issue 3. – RCTI did not appeal the Spokane County Court Order of On May 17, 2013. The issue is not briefed and Respondent does

not refer the Court to any support in the Record on Appeal for this contention. This is not proper briefing before this court. See RAP 13.4(d). *Roberts v. Dudley*, 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000). The Supreme Court should decline to consider this issue.

4. Regarding issue 4 - Fourth Issue – Respondent’s Answer at 4-5 raises the issue that SBPI fully understood, on June 7, 2014, that the ownership of the molds remained with RCTI, and that this court order merely dictated **possession** of the molds which enabled SBPI to chose a different manufacturer. This issue was not raised by Appellant. The Respondent does not refer the Court to any support in the Record on Appeal for this contention.

This is not proper briefing before this court. See RAP 13.4(d) "A party may file an answer to a petition for review. *Roberts v. Dudley*, 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000). The Supreme Court should decline to consider this issue.

However, SBPI’s raising of the issue, described as “possession”, is relevant to the elements to be considered “under all the circumstances” when conducting a proper contract construction and ambiguity analysis. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 80 P.2d 222 (1990); *Scott Galvanizing, Inc. v. Nw. EnviroServices. Inc.*, 120 Wn .2d 573, 580, 844

P.2d 428 (1993); *State Farm Mut. Auto. Ins. Co. v. Avery*, 57 P.3d 300, 114 Wn.App. 299, 311 (Wash.App. Div. 3 2002).

5.Fifth Issue - Respondent's Answer at 6 raises the issue that Seth Burrill Production Inc. (hereafter SBPI) has never received any monetary satisfaction of the judgment or award of attorney fees. The issue is not briefed and Respondent does not refer the Court to any support in the Record on Appeal for this contention. This is not proper briefing before this court. See RAP 13.4(d). *Roberts v. Dudley*, 993 P.2d 901, 140 Wn.2d 58, 86 (Wash. 2000). The Supreme Court should decline to consider this issue.

6.Sixth Issue - Respondent's Answer at p7 asserts the issue that RCTI has appealed from a Finding of Contempt. This issue was not raised by Appellant. Appellant's issues regarded contract construction and ambiguity.

**ARGUMENT RE: CONTRACT CONSTRUCTION AND
AMBIGUITY**

Appellant's Petition for Review recited Issues pertaining to contract construction and resolution of ambiguity. The Petition for Review was focused on the failure and refusal of the Trial Court to

consider the “Use” allowed to the Respondent when “Use” was modified by the phrase added to the License Agreement by the Arbitration Decision and adopted by the Trial Court where wherein a “transfer” was implemented. The issues raised by Appellant relate to the impact on “use” by this addition to the Agreement. The Appellant’s issues before the Trial Court and the Court of Appeals primarily pertained to ambiguity and contract construction. The principal issue regarded the nature of “Use” as changed from the “Use” prior to the Arbitration Decision to the “Use” permitted following the Arbitration Decision and the “transfer” thereafter permitted.

When a Court orders someone to perform an act there must be clarity as to the definition of the act. The Court must consider ambiguity. If ambiguous then the actions taken do not comprise contempt.

Division III, considered ambiguity in *In re Marriage of Davisson*, 126 P.3d 76, 131 Wn.App. 220, 226 (Wash.App. Div. 3 2006), stated that the process was strict construction of the order, concluded that the Order of Contempt was ambiguous and that the father’s actions did no constitute contempt. The Court stated:

“In determining whether the facts support a finding of contempt, **the court must strictly construe the order** alleged to have been violated, and the facts must constitute a plain violation of the order. *Johnston v. Beneficial Management Corp. of Am.*, 96 Wash.2d 708, 713-14, 638 P.2d 1201 (1982). (Emphasis added)

Because the express directive requiring the mother's consent Before the father could take Erin to church was removed from the amended order of September 6, 1994, Judge Donohue could reasonably conclude the order was ambiguous and the father's actions did not constitute contempt. ..” *In re Marriage of Humphreys*, 903 P.2d 1012, 79 Wn.App. 596, 599 (Wash.App. Div. 3 1995) (Emphasis added)

See *State, Dept. of Ecology v. Tiger Oil Corp.*, 271 P.3d 331, 166 Wn.App. 720 (Wash.App. Div. 2 2012) where the order of contempt was held ambiguous.

Also See *Graves v. Duerden*, 754 P.2d 1027, 51 Wn.App. 642, 647-8 (Wash.App. Div. 3 1988) stating in part:

Washington courts have consistently applied a **"strict construction" rule for interpretation of judicial decrees, violation of which provides the basis for contempt proceedings:**

In contempt proceedings, an order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit was brought. **The facts found must constitute a plain violation of the order.** *State v. International Typographical Union*, 57 Wn.2d 151, 158, 356 P.2d 6 (1960); 17 C.J.S. Contempt § 12 (1963). (Emphasis added)

Johnston v. Beneficial Management Corp., 96 Wash.2d 708, 712-13, 638 P.2d 1201 (1982).

The purpose for this rule is to protect persons from contempt proceedings based on violation of judicial decrees 51 Wn.App. 648 **that are unclear or ambiguous, or that fail to explain precisely what must be done.** See *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967) ("unintelligible" decree "defie[d] comprehension"); *State v. International Typographical Union*, 57 Wash.2d 151, 356 P.2d 6 (1960) (act complained of not specifically prohibited by decree). (Emphasis added).

Also See the effect of ambiguity where the "collateral bar" rule is to be considered in contempt proceedings arising from its violation, since

a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid. The court recognized *State v. Coe*, 101 Wn.2d 364, 369-70, 679 P.2d 353 (1984) stating:

However, we have long recognized at least one exception: a contempt conviction will fall if the underlying order was not within 'the scope of the jurisdiction of the issuing court, " but Sam has not argued, and cannot show, that this exception applies. *Coe*, 101 Wn.2d at 370 (citations omitted) (quoting *Mead School Dist. No. 354 v. Mead Educ. Ass'n*, 85 Wn.2d 278, 280, 534 P.2d 561 (1975)). **Sam had a right to challenge this portion of the decree as ambiguous in the prior appeal, but chose not to exercise that right.** (Emphasis added)

ABUSE OF DISCRETION

In this matter Counsel Floyd E. Ivey, motioned for Continuance of Plaintiff's Motion for Contempt, filed Briefing on October 31 and appeared in the Superior Court case on November 1, 2013 and argued for Continuance of the Motion for Contempt which was docketed for November 1, 2013. Counsel Ivey's Brief, CP 145-155, addressed at length contract construction and ambiguity issues. The focus of the Appellant's case to the Trial Court, commencing with Briefing and Argument on November 1, 2013 and again on November 15, 2013 addressed contract construction and ambiguity and was made to the Trial Court and thereafter to the Court of Appeals and now to the Supreme Court.

The Trial Court reviewed all of Appellant's briefing, CP 145-155,

CP 158-238, filed on October 31 and November 13, 2013.. The Trial Court refused to consider the facts and law and rendered a conclusion without a finding of fact. Appellant's Brief at CP 158-238 is found in the Appendix titled "Memorandum and Argument Opposing Plaintiff's Motion for Contempt and Defendant's Motion to Define "Transfer and/or Delivery of Molds to Plaintiff." The Trial Court did not consider "all of the circumstances" of surrounding the "Use" allowed to the Respondent in light of the change of obligations and authority by the addition of "transfer and or delivery" to the License Agreement.

On November 15, 2013 the Court introduced the hearing starting at RP 16/line 2 in the RP and stating at the outset:

"I spent a lot of time looking over the file and the documents that have been submitted." RP 16/line 3-5. At RP 16/lines 18-22 the court stated that "Third, I do find that a large portion of the Defendant's materials and argument are irrelevant to the issue at hand and I will not be considering those materials or arguments that are not relevant to the issue before us."

The Trial Court continued at RP 17/line 7-22 stating that the sole argument before the court was whether an order had been willfully and intentionally violated. The Court commented on the word transfer and described its statements at RP 17/line 7-22 as its findings.

For consideration of the Trial Court's refusal to consider Appellant's briefing and argument, the Court's Order is noted, CP 270,

stating under BASIS “Plaintiff’s Motion to Shorten Granted – Motion to Strike Denied – Defendant’s Motion Re: Ambiguity Denied.” and further, under ORDER “IT IS ORDERED that: Motion Shorten Granted; Motion Strike Denied; ~~Defendant’s Motion Re: Ambiguity Denied.~~” That is, the phrase “Defendant’s Motion Re: Ambiguity Denied” is struck through or struck out. The Court’s Order regarding ambiguity is found in the Appendix CP 270.

The Court’s comments at the November 15, 2013 hearing are set out in their entirety in the Appendix commencing at RP 16/line 2. Counsel Ivey’s Argument is found in the Appendix RP 22/lin2 21 to RP 23. An excerpt of the Trial Court’s comments follow commencing at RP22/line 2, Judge Clark speaking:

2 Counsel, let me kind of focus some things
3 here this morning. **I spent a lot of time**
4 **looking over the file and the documents that**
5 **have been submitted. (Emphasis added)** I'm going to
make a
6 number of findings based upon those pleadings
7 and try and tell you where I need to be with
8 regards to the argument this morning.
9 So findings I would make are as follows:
10 First, I am going to grant the Plaintiff's
11 motion to shorten time to hear the Plaintiff's
12 motion to strike the Defendant's memorandum and
13 other pleadings. So motion to shorten time is
14 granted.
15 Second, I'm going to deny the Plaintiff's
16 motion to strike the memorandum and other
17 pleadings.
18 **Third, I do find that a large portion of**

19 the Defendant's materials and argument are
20 irrelevant to the issue at hand and I will not
21 be considering those materials or arguments
22 that are not relevant to the issue before us.
23 The issue before us is that there is a
24 valid judgment. The question is whether the
25 order has been violated, (Emphasis added)

The Court knew that issues raised and briefing from RCTI focused on contract construction and ambiguity and not on contempt, RP 24/line 18-25. The Trial Court was appraised of the issue of ambiguity, the approach taken by the Supreme Court and Division III to ambiguity from *Berg, Enviro and State Farm*, supra, and the court heard argument but made no response to contract construction or ambiguity and only addressed contempt.

The Trial Courts act was an abuse of discretion.

In *Moeller v. Farmers Ins. Co. of Washington*, 267 P.3d 998, 173 Wn.2d 264, 280-81 (Wash. 2011) the Court said: “The trial court heard four days of oral argument on this issue and considered extensive briefing. See CP at 1573. Nothing in the record supports the proposition that the trial court's decision is unreasonable or untenable. We hold that the trial court did not abuse its discretion...”

Here the Court had extensive briefing and argument, described the Appellant’s briefing as irrelevant and advised that the Court would not be considering those materials or arguments.

The Court did not state what it was that was about the briefing that was irrelevant. Was the Court’s action unreasonable?

The Court in *Wilson v. Horsley*, 974 P.2d 316, 137 Wn.2d 500, 505 (Wash. 1999) said: The trial court's decision "will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

Division III said in *State v. Barry*, 339 P.3d 200 (Wash.App. Div. 3 2014)As such, we review a trial court's decision on relevance and prejudicial effect for manifest abuse of discretion. Id. " Abuse of discretion is 'discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" Id. (internal quotation marks omitted). (quoting *State v. Tharp*, 27 Wn.App. 198, 206, 616 P.2d 693 (1980)). Any error in a trial court's decision " 'requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.'"

The Trial Court, in the present matter, ignored extensive briefing and argument. The outcome, should ambiguity have been found, would have materially affected the rights of the Appellant in the property comprising plastic injection molds.

STANDARD OF REVIEW

The Standard of Review for questions of law, including the interpretation of contract provisions, was addressed in the Brief to the Court of Appeals at 11. The Standard of Review is de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We apply fundamental contract construction rules when interpreting a contract and to the extent we interpret contract provisions; we apply the de novo standard of review. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Kim v. Moffett*,

CONCLUSION

The briefing and argument presented by Appellate to the Trial Court comprised an extensive presentation of fact and law regarding the circumstances where contract construction and ambiguity required the Trial Court's focus. The Trial Court's reviewed briefing of 10/31/13 and 11/15/13 and gave attention to argument on November 1 and 15, 2013 regarding contract construction and ambiguity. That knowledge of briefing and argument was preceded with the Court's advice, on November 15, 2013, that Defendant's briefing and argument would be fully ignored, that no issue raised by Defendant would be addressed by the Court and was thereafter followed with absolute denial of consideration to the contract construction and ambiguity issues. The Trial Court demonstrated a "clear showing of abuse of discretion". The refusal to consider these issues was made without comment. There was no clarifying statement. The Trial Court's dismissal of Appellant's issues was manifestly unreasonable. The Trial Court's refusal was accomplished with no statement of grounds and was exercised on untenable grounds and for untenable reasons."

The Court of Appeals paralleled the Trial Court in its consideration of the Trial Court's actions.

The Court of Appeals should be reversed. The Supreme Court

should consider this case de novo.

Appellant should be awarded attorney fees.

Respectfully submitted this 6th day of October, 2015.

A handwritten signature in black ink, appearing to read "Floyd E. Ivey". The signature is written in a cursive style with a large, prominent initial "F".

Floyd E. Ivey, WSBA 6888, Attorney for Appellant

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The Appendix is sent separately as it may be a large file requiring division.

Counsel for Respondent is hereby served with Title, Content, Authorities and Reply Brief.

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Counsel: Please send your appendix by U.S. mail as there are too many pages for us to print out.

Thank you.

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Filed now is the Appendix Index and the Appendix Contents, 92085-1, Burrill v. Rebel Creek

Counsel for Respondent is hereby served.

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APPENDIX

TABLE OF CONTENTS	1
CERTIFICATE OF SERVICE	2
NOTICE OF APPEARANCE	3
APPELLANT'S OCTOBER 29, 2013 BRIEFING TO THE TRIAL COURT; MEMORANDUM, DECLARATION AND ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION FOR A CONTINUANCE OF PLAINTIFF'S MOTION FOR CONTEMPT AND IN PARTIAL RESPONSE TO PLAINTIFF'S MOTION FOR CONTEMPT	4 - 14
APPELLANT'S NOVEMBER 13, 2013 BRIEFING TO THE TRIAL COURT; MEMORANDUM AND ARGUMENT OPPOSING PLAINTIFF'S MOTION FOR CONTEMPT AND DEFENDANT'S MOTION TO DEFINE "TRANSFER AND/OR DELIVERY" OF MOLDS TO PLAINTIFF TRANSCRIPT EXCERPTS-TRIAL COURT AND COUNSEL	16-96
TRIAL COURT ORDER NOVEMBER 15, 2013 RE; AMBIGUITY	97
TRANSCRIPT OF PROCEEDING NOVEMBER 1, 2013 - DEFENDANT'S MOTION FOR CONTINUANCE	98-105
TRANSCRIPT OF PROCEEDING NOVEMBER 15, 2013 -COURT'S COMMENTS AND DEFENDANT'S ARGUMENTS	106-113
COURT OF APPEALS BRIEF	114-172

CERTIFICATE OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on October 6, 2015 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Reply To Respondent's Answer to Petition for Review; Appendix

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DATED: October 6, 2015



Floyd E. Ivey, WSBA #6888
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Supreme Court 92085-1

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**THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK**

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

**SETH BURRILL PRODUCTIONS, INC., a)
Washington corporation,)
Plaintiff,)**

CASE NO. 13-2-01982-0

NOTICE OF APPEARANCE

vs.

**REBEL CREEK TACKLE, INC., a)
Washington corporation,)
Defendant)**

TO: CLERK OF THE COURT and to PLAINTIFFS and their counsel, Jeffrey R. Smith.

Please take notice that Defendant, REBEL CREEK TACKLE, INC., without waiving objections as to service or lack of jurisdiction, hereby appears in the above-entitled action by and through the undersigned attorneys, and request that all further papers and pleadings, except original process, be served upon the undersigned attorneys at the address below stated.

DATED this 25th day of October, 2013.

NOTICE OF APPEARANCE

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1 availability to hear a Motion for Continuance. On Monday, October 26, 2013, Ivey was advised
2 that the Motion for Continuance was scheduled contemporaneously with the Motion for
3 Contempt.

4
5 Plaintiff seeks delivery into Plaintiff's possession Defendant's property
6 comprising plastic injection molds. Plaintiff indicates that the Defendant's property, the plastic
7 injection molds, will be removed to a location and company unknown to Defendant and with
8 whom Defendant has no contact or means of communication. The Plaintiff's request raises
9 issues of the construction of the particular paragraph 5 of the License Agreement between
10 Plaintiff and Defendant. Paragraph 5 states in part that Plaintiff is to have "...full and
11 unrestricted use of the injection molds...?" The molds presently reside and have resided, since
12 2009, at the premises of Plastic Injection Molding (hereafter PIM), Richland Washington. No
13 one, to Ivey's knowledge, has obstructed Plaintiff from the unrestricted use of the molds at PIM.
14 Ivey is aware that PIM has been instructed to not remove the molds from PIM and that Plaintiff's
15 request for removal from PIM has been refused.

16
17 Defendant's understanding of "...full and unrestricted use..." is that the
18 molds can be used to produce a product at PIM only for Plaintiff and not for Defendant.
19 Defendant is unaware of any Order or Judgment holding that the Plaintiff has power to remove
20 the property from PIM. Defendant submits that this lack requires an examination of contract
21 construction necessarily involving evidence extrinsic to the License Agreement to determine if
22 "...full and unrestricted use..." empowers the Plaintiff to remove the molds from the company
23 where the molds have always resided and with which Defendant has a long standing relationship.

24
25
26 Removal of Defendant's property to an unknown company and location

27
28
MOTION CONTINUANCE

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1 raises issues of bailment and warehousemen's liens. Without certainty of the location of the
2 property and without means of testing to see how and when it is used and maintained leaves the
3 Defendant with no certain relief should Plaintiff breach the agreement, become incapacitated or
4 suffer death while being without sufficient records to identify the location of the property.
5 Defendant is without protection should Plaintiff fail to pay for any lien available to the new and
6 unknown company. RCW 62A.7-209 may apply authorizing a lien. A default by Plaintiff
7 relative to the new plastic injection molding company, which is housing the thousands of pounds
8 of steel comprising the plastic injection molds, without awareness by the Defendant may result in
9 destruction or sale of the Defendant's property.
10
11

12 Additionally, Defendant's intentions and credibility have been revealed by
13 the Memoranda and Declarations presented by Counsel Chris Lynch on behalf of Plaintiff and by
14 the testimony of the Plaintiff during arbitration.
15

16 Plaintiff and Defendant have the capacity to engage in discussions which
17 can resolve the issues indicated. Such cannot occur by Friday, November 1, 2013. However,
18 such could occur by the end of November or by early December.
19

20 Defendant requests the Court to Continue the Plaintiff's Motion for
21 Contempt to December 20, 2013.
22

23 B.STATUS OF THE CASE: Mr. Allen Osborn invented a fishing device
24 which is memorialized in United States Patent No. 7,654,031 and titled "Trolling apparatus and
25 method of use." Subsequently Mr. Osborn invented an improvement to the fishing device
26 disclosed by Patent No. 7,654,031 and filed a United States Patent Application No. 20100223834
27
28

MOTION CONTINUANCE

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1 titled Trolling Apparatus and Method of Use With Elevator and Diverter Structure. Mr. Osborn
2 formed RCTI, a Washington Corporation.

3
4
5 **C.THE RELATIONSHIP BETWEEN DEFENDANT AND PLAINTIFF:**

6 In 2009 Mr. Osborn met Mr. Seth Burrill of Seth Burrill Productions Inc., hereafter SBPI, who
7 represented to be an expert in sport fishing. Mr. Osborn showed Mr. Burrill one of the devices
8 described in Patent No. 7,654,031. Mr. Osborn did not show one of the devices described in the
9 above mentioned Patent Application. Over the next weeks discussions occurred between Mr.
10 Osborn and Mr. Burrill regarding SBPI being a licensee for the sale of the two fishing products.
11 A License Agreement was executed in June 2010 where SBPI would be the exclusive licensee to
12 sell the devices invented by Mr. Osborn.
13
14

15
16 **D.DISAPPOINTING PERFORMANCE: Sales performance by SBPI was**

17 disappointing and an arbitration occurred to determine the rights remaining to SBPI. SBPI
18 prevailed. A provision of the License Agreement stated that:

19 5. LICENSOR has paid for the manufacture of the initial prototype units and the
20 injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall
21 have the right to the full, unrestricted use of the injection molds during the term of this
22 AGREEMENT.

23 The Arbitration Decision stated, relative to this paragraph 5. that SBPI shall have full,
24 unrestricted use of the injection molds during the term of the License Agreement, and Rebel
25 Creek Tackle, Inc. shall cooperate in the transfer and/or delivery of said molds as requested by
26 Seth Burrill productions, Inc.
27
28

MOTION CONTINUANCE

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E. PLANTIFF'S EFFORTS AND INTENTIONS: Plaintiff Counsel for SBPI at page 2/paragraph 5 of his Declaration in support of this Motion for Contempt, states that his firm has negotiated with Mr. Ken Williams, the owner of PIM which is the sole plastic injection molding company which has made the Osborn Fishing Devices. Paragraph 5 of attorney Smith's Declaration states in part:

"My office eventually reached an agreement with PIM by which SBPI would obtain diver devices in exchange for an agreed upon sum. SBPI also requested transfer of the molds to SBPI."

F. REPRESENTATION OF RCTI: Attorney Floyd E. Ivey, counsel appearing in this matter for RCTI, has, with the exception of the period of early September, 2013 until October 24, 2013, represented RCTI since 2007 regarding Patent Prosecution and in the Arbitration of SBPI v. RCTI. Ivey has spoken with Mr. Osborn hundreds of times over these years, about patent issues, factual issues regarding SBPI's disappointing sales performance and legal issues regarding any potential relief from SBPI being the exclusive licensee but with such poor performance. Ivey has spoken with Mr. Ken Williams of PMI many times regarding many different projects but primarily with regard of Mr. Osborn's Fishing Inventions.

It was always understood, by RCTI and Mr. and Mrs. Osborn, that PIM and Ken Williams would be the sole plastic injection molding company which would manufacture the fishing inventions. Mr. Williams assisted in the design of the one thousand pound molds from which the plastic Fishing Device would be manufactured. Mr. Williams suggested injection molding techniques which would be used to simplify the manufacture of the

MOTION CONTINUANCE

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1 molds and ease the injection molding process. Mr. Williams devised the metal adjustments to
2 the molds when initial test production revealed failures. Mr. Williams has from the first instance
3 been instrumental in facilitating the manufacture of the molds and then of the Fishing Devices.
4 Mr. Williams has tested combinations of plastics to determine those most suitable for the
5 production of the Fishing Devices. Mr. Williams and Mr. Osborn have worked closely since
6 approximately 2007 or 2008. Mr. Osborn has trust in and a relationship with Mr. Williams.
7

8 PIM and Mr. Williams' relationship to the molds, Mr. Osborn and the
9 Fishing Device is contrasted with the above statement from Counsel Smith's Declaration:
10

11 that PIM would obtain devices from PIM and, at the same time request transfer of the
12 molds from PIM.

13 The "transfer of the molds from PIM" demonstrates SBPI's intention to
14 terminate production by PIM and to effect the removal of the molds to an unknown location.

15 Mr. Burrill, during the arbitration, indicated his displeasure with the fact
16 that Mr. Williams communicated production activities to Mr. Osborn. Mr. Burrill was
17 vigorously opposed to Mr. Osborn having any awareness of product production of the Osborn
18 Fishing Device for SBPI. Without awareness of production RCTI would be without critical data
19 required for the testing of the accuracy of the quarterly reporting by Mr. Burrill.
20

21 Mr. Burrill had during quarters preceding 2012, identified sales made to
22 each commercial customer with each domestic and international commercial customer identified
23 by Name, i.e., The White Elephant, Griggs Department Stores, Ranch and Home, DerFischer
24 Peter. Mr. Burrill by his Declarations or testimony during the Arbitraion stated that such
25 specific identification of commercial customers was hence forth not going to happen. Mr. Burrill
26 stated that his general counsel, Mr. Joseph G. Carroll, had advised Mr. Burrill that the
27
28

MOTION CONTINUANCE

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1 identification of each customer was not required. Without awareness of specific commercial
2 customers RCTI would be without critical data required for the testing of the accuracy of the
3 quarterly reporting by Mr. Burrill.
4

5 Correspondence from Attorney Mr. Chris Lynch of Lee & Hayes,
6 preceding the Arbitration stated that Mr. Burrill was either the sole inventor or had contributed to
7 the invention of the Fishing Device found in the above referenced Patent Application. Mr.
8 Lynch asserted such Inventorship attributes in Mr. Burrill in the Arbitration Demand. In the first
9 contemporaneous arbitration discovery exchange Mr. Burrill by Declaration stated that he was
10 the sole inventor of Mr. Osborn's Fishing Device and that he had instructed Mr. Osborn in
11 making the structures which comprise the "invention" that distinguished the Fishing Device
12 disclosed in the Patent Application from the Fishing Device already patented.
13

14 Mr. Burrill's contention was contrasted with Mr. Osborn's
15 contemporaneous production in Arbitration Discovery. In Mr. Osborn's production, Mr. Osborn
16 revealed more than 60 versions of the Fishing Devices, commencing with devices made in 2005
17 and including the one which was eventually the Fishing Device found in the granted United
18 States Patent. This same contemporaneous production revealed several prototypes made by Mr.
19 Osborn which revealed the inventive structure supporting the subsequently filed Patent
20 Application. These early prototypes, revealing the new Structure for the New Patent
21 Application, were made and tested by Mr. Osborn prior to Mr. Osborn and Mr. Burrill meeting in
22 2009. That is, the structure of the fishing device revealed in the New Patent Application was
23 invented, made and tested by Mr. Osborn before he ever met Mr. Burrill.
24
25

26 Thereafter, following the contemporaneous discovery exchange and the
27
28

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1 revelation of Mr. Osborn's invention of the New Structure, Mr. Burrill's claim to be the inventor
2 was subjected to a Motion for Summary Judgment. Responding to the Motion for Summary
3 Judgment, Mr. Burrill gave a Declaration revising his claim to be the sole inventor. Mr. Burrill
4 retreated and claimed that he had not invented the whole structure of the Fishing Device claimed
5 in the New Patent Application but only a variation of the new Fishing Device. However, Mr.
6 Osborn had already tested the new Fishing Device with this suggested variation prior to meeting
7 Mr. Burrill.
8

9
10 A Declaration by Mr. Chris Lynch, either in response to the Motion for
11 Summary Judgment or at a subsequent time in the Arbitration, stated that he, Mr. Chris Lynch,
12 had suggested to Mr. Burrill that he, Mr. Burrill, may be an inventor or co-inventor. There was
13 no response by Mr. Lynch to the 60 versions of the initial patented Fishing Device or of the new
14 structure comprising the substance of the New Patent Application. There was no retraction of
15 the claim that Mr. Burrill was an inventor and not suggestion of subsequent investigation of the
16 possibility that Mr. Burrill had an Inventorship status.
17

18
19 G.Mr. James Craven, in the capacity of Arbitrator in the matter of SBPI v.
20 RCTI relating to the licensing, found that Mr. Burrill had contributed nothing to the invention.
21 Arbitrator Craven's finding is an implicit finding that Mr. Burrill's claim was without credibility.
22

23
24 The request of Mr. Burrill's present motion for Contempt must be viewed
25 in light of the meaning of the phrase "...full, unrestricted use...". The extent of control created
26 by this phrase is neither defined in the License Agreement nor by Court Order. That "meaning"
27 must be determined by extrinsic evidence. *Vacova Co. v. Farrell*, 814 P.2d 255, 62 Wn.App.
28

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1 386, 399 (Wash.App. Div. 1 1991) holding in part "Furthermore, even if the patent ambiguities
2 of the contract had not been reconciled by means of the rules of contract construction, the result
3 would have been an ambiguous contract and "[i]t is axiomatic that extrinsic evidence ... is
4 admissible to clarify such matters."
5

6
7 The request of Mr. Burrill's present motion for Contempt must be viewed
8 in light of Mr. Burrill's intentions. Mr. Burrill's intentions are demonstrated by Mr. Burrill's
9 Declarations or Testimony. The intention that the molds be conveyed to an unknown plastic
10 injection molding company, of whom Mr. Osborn has no knowledge, is the intention and has the
11 result of denying sales data to Mr. Osborn.
12

13 The intention that the molds be conveyed to an unknown plastic injection
14 molding company, of whom Mr. Osborn has no knowledge, is the intention and has the result of
15 denying knowledge of the location and condition of the property of RCTI.
16

17 The intention to no longer reveal the Name of the Domestic and
18 International Commercial Customers and the number of sales made to those Commercial
19 Customer is the intention and has result to deny sales data to Mr. Osborn.
20

21 Mr. Burrill, in past quarterly sales reports, failed to reveal sales made to
22 commercial customers where such sales were known to Mr. Osborn.
23

24 Mr. Burrill's failed claim to be the inventor demonstrates that Mr. Burrill
25 is without credibility. Mr. Burrill's intention to remove the molds to an unknown company and
26 to not reveal sales to customers strongly infers the intention of Mr. Burrill and SBPI to maintain
27 two sets of books. One set for quarterly reporting to Mr. Osborn and a second set showing the
28 actual sales and income.

MOTION CONTINUANCE

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H.CONCLUSION: Having such late notice of the Motion for Contempt precluded the extraction of every paragraph from the multitude of Memoranda and Declarations filed in the Arbitration. Attorney Floyd E. Ivey asserts and declares that such evidence exists in those Memoranda and Declarations.

The lack of definition in "...full, unrestricted use..." relative to removal of the property, the intention to restrict and deny sales data to Mr. Osborn, the intention to deny the identification and number of sales to commercial customers, and the doubt cast on Mr. Burrill's credibility by Arbitrator Craven's finding support the continuation of Plaintiff's Motion.

It is expected that some time for Defendant and Plaintiff to engage on these points may eliminate the need to again seek the action of the Court. Some time to engage is certainly likely to expose evidence which will assist the Court.

Defendant asks that the Plaintiff's Motion be Continued. In the alternative Defendant asks that the Plaintiff's Motion for Contempt be denied.

Respectfully submitted this 29th day of October, 2013.

IVEY Law Offices, P.S. Corp



Floyd E. Ivey, WSBA #6888
Attorneys for Defendant

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REBEL CREEK TACKLE, INC.
Notice of Appearance
Case No. 13-2-01982-0

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AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on October 29, 2013 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Jeffrey R. Smith
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 Facsimile
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 EMAIL (PILKINTON)

DATED: October 29, 2013



Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Motion for Continuance
Case No. 13-2-01982-0

MOTION CONTINUANCE

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FILED

NOV 13 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

8	SETH BURRILL PRODUCTIONS, INC., a)	CASE NO. 13-2-01982-0
9	Washington corporation,)	
10	Plaintiff,)	MEMORANDUM AND
11	vs.)	ARGUMENT OPPOSING
12	REBEL CREEK TACKLE, INC., a)	PLAINTIFF'S MOTION FOR
13	Washington corporation,)	MOTION FOR CONTEMPT AND
14	Defendant)	DEFENDANT'S MOTION TO DEFINE
		"TRANSFER AND/OR DELIVERY" OF
		MOLDS TO PLAINTIFF

MEMORANDUM AND ARGUMENT OPPOSING PLAINTIFF'S MOTION FOR
CONTEMPT AND SUPPORTING MOTION TO DEFINE "TRANSFER AND/OR
DELIVERY" OF MOLDS TO PLAINTIFF

A. DEFENDANT'S MOTION FOR CONTINUATION: Defendant's Motion for
Continuation of Plaintiff's Motion for Remedial Sanctions of Contempt was heard and granted
on November 1, 2013 with continuance granted to November 15, 2013.

B. THE PHRASE "TRANSFER AND/OR DELIVERY" IN THE JUDGMENT IS
AMBIGUOUS. WHERE AMBIGUITY THEN PAROL/EXTRINSIC EVIDENCE: Plaintiff

MOTION OPPOSING/DEFINE TRANSFER

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1 moved for remedial sanctions to find Rebel Creek Tackle, Inc. (hereafter Osborn) in Contempt
2 alleging failure to facilitate "transfer and/or delivery" of plastic injection molds to Seth Burrill
3 Productions Inc. (hereafter Burrill).
4

5 1. THE WORD "TRANSFER" DOES NOT MAKE A "SALE" FROM
6 OSBORN TO BURRILL: The word "transfer" is consistently synonymous with the words
7 "sale" and "convey" in Washington State law. However, in this case Burrill's right is only
8 related to "USE" of the Molds and not to sale. With "sale" and "transfer" synonymous in this
9 state, the use of "transfer" here is ambiguous. The law is as follows:
10

11 a. "The issue posed is whether the interpretation of the statutory language
12 "sells or otherwise conveys, directly or indirectly" includes a transfer to a secured
13 creditor of inventory in which the creditor holds a security interest." . *Martin v.*
Meier, 111 Wash.2d 471, 479, 760 P.2d 925 (1988)

14 b. The word "sale" is considered in *Palmer v. Department of Revenue*,
15 917 P.2d 1120, 82 Wn.App. 367, 372-75 (Wash.App. Div. 2 1996) as
16 follows:

17 1). At 82 Wn.App.373 – "Sale is defined in RCW
18 82.04.040, in part, as follows: "Sale" means any transfer of
19 the ownership of, title to, or possession of property for a
20 valuable consideration and includes any activity classified
as a "sale at retail" or "retail sale" under RCW
82.40.050."...

21 This definition incorporates the plain and ordinary
22 meaning of "sell," which is a transfer or exchange of property,
23 goods, or services to another for money or its equivalent. See
Webster's New World Dictionary (3d. ed.1989)....

24 In Black's Law Dictionary 333 (6th ed.1990) the word
25 "convey" is defined as: To transfer to another. To pass or transmit
the title to property

26 2). AT 82 Wn.App. 374 – "...To transfer property or the
27 title to property by deed, bill of sale, or instrument under
28

MOTION OPPOSING/DEFINE TRANSFER

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1 seal. Used popularly in sense of "assign", "sale", or
2 "transfer."

3 3.) At 82 Wn.App. 375 -- "...provides that "[s]uch a
4 transfer of collateral is not a sale or disposition of the
5 collateral."

6 c. "...the contracting party sufficiently indicates an intention to make
7 some particular property, real or personal, or fund, therein described or identified,
8 a security for a debt or other obligation, or whereby the party promises to convey
9 or assign or ~~transfer~~ the property as security, creates an equitable lien upon the
10 property so indicated, which is enforceable against the property in the hands not
11 only of the original contractor, but of his heirs, administrators, executors,
12 voluntary assignees, and purchasers or incumbrancers with notice.' This statement
13 of the law is in harmony with [55 P. 37] universal authority, but we do not see
14 that it can be made applicable to appellant's interest in this case, for the statement
15 assumes the very question which is in dispute here, viz. whether or not the party
16 promised to convey or assign or transfer this property as security. It is the
17 intention of the parties to the contract which is to be determined from the
18 phraseology of the instrument." *Hossack v. Graham*, 55 P. 36, 20 Wash. 184, 188
19 (Wash. 1898)

20 d. Under the second alternative, the State must prove that Sant trafficked
21 in stolen property. RCW 9A.82.050(1). To "traffic" in stolen property means to
22 "sell, ~~transfer~~, distribute, dispense, or otherwise dispose of stolen property to
23 another person, or to buy, receive, possess, or obtain control of stolen property,
24 with intent to sell, transfer, distribute, dispense, or otherwise dispose of the
25 property to another person." RCW 9A.82.010(19). *State v. Sant*, 37668-7-II(Div.
26 II 2009)

27 e. Other jurisdictions agree gift transfers or transfers without
28 substantial consideration inuring to the benefit of the principal violate the scope of
authority conferred by a general power of attorney to sell, exchange, transfer, or
convey property for the benefit of the principal. *E.g.*, *Shields v. Shields*, 200
Cal.App.2d 99, 19 Cal.Rptr. 129 (1962); *Aiello v. Clark*, 680 P.2d 1162 (Alaska
1984); *Fierst v. Commonwealth Land Title Ins. Co.*, 499 Pa. 68, 451 A.2d 674
(1982); *Gaughan v. Nickoloff*, 28 Misc.2d 555, 214 N.Y.S.2d 487 (1961); *King v.*
Bankerd, 303 Md. 98, 492 A.2d 608 (1985). *Bryant v. Bryant*, 882 P.2d 169, 125
Wn.2d 113, 118-19 (Wash. 1994)

f. The writ commanded the bank not to pay any debts to the Knapps and
"not to deliver, sell, or transfer, or recognize any sale or transfer of, any personal
property or effects of the Defendant in your possession or control...." *Fireman's*

MOTION OPPOSING/DEFINE TRANSFER

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1 *Fund Ins. Co. v. Northwest Paving and Const. Co., Inc.*, 891 P.2d 747, 77
2 Wn.App. 474, 478 (Wash.App. Div. 3 1995)
.....

3 2. EXTRINSIC EVIDENCE OF THE MEANING OF "TRANSFER"-

4 CONSIDER ALL THE CIRCUMSTANCES: Case law addresses the admission
5 of extrinsic evidence as follows:
6

7 a. The question in this case involves interpretation of the indemnity clause
8 contained in the Hazardous Waste Agreement. Indemnity agreements are interpreted like any other contracts, *Jones*
9 *v. Strom Constr. Co.*, 84 Wash.2d 518, 520, 527 P.2d 1115 (1974), and the touchstone of the interpretation of
10 contracts is the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990); *Bonneville*
11 *Power Admin. v. Washington Public Power Supply System*, 956 F.2d 1497, 1505 (9th Cir.1992) (applying
12 Washington law). Therefore, the intention of the parties must be the starting point for the interpretation of the
13 indemnity agreement. See *Scruggs v. Jefferson County*, 18 Wash.App. 240, 243, 567 P.2d 257 (1977) (indemnity
14 provision construed to effectuate intent of the parties); *McDowell v. Austin Co.*, 105 Wash.2d 48, 53, 710 P.2d 192
15 (1985) (indemnity agreements enforced according to intent of parties). In Washington, the intent of the parties to
16 a particular agreement may be discovered not only from the actual language of the agreement, but also from
17 "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances
18 surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the
19 reasonableness of respective interpretations." *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573,
20 580, 844 P.2d 428 (1993) (Emphasis added)

21 b. General principles of contract law govern settlement agreements. *Lavigne v.*
22 *Green*, 106 Wn.App. 12, 20, 23 P.3d 515 (2001). In construing a contract, this court first looks to the language of the
23 agreement. *Hadley*, 60 Wn.App. at 438. The parol evidence rule bars the admission of extrinsic evidence "to add to,
24 subtract from, vary, or contradict written instruments which are contractual in nature, and which are valid,
25 complete, unambiguous, and not affected by accident, fraud, or mistake." *Bond v. Wiegardt*, 36 Wn.2d 41, 47, 216
26 P.2d 196 (1950). (Emphasis added)

27 c. If the writing was not intended to be complete, evidence of additional terms
28 is admissible. *Univ. Prop., Inc., v. Moss*, 63 Wn.2d 619, 621, 388 P.2d 543 (1964).
"People have the right to make their agreements partly oral and partly in writing, or
entirely oral or entirely in writing; and it is the court's duty to ascertain from all relevant,
extrinsic evidence, either oral or written, whether the entire agreement has been
incorporated in the writing or not." *Id.* (quoting *Barber v. Rochester*, 52 Wn.2d 691, 698,
328 P.2d 711 (1958)).

d. The touchstone of contract interpretation is the parties' intent. *Scott*
Galvanizing, Inc. v. Nw. EnviroServices, Inc., 120 Wn.2d 573, 580, 844 P.2d 428 (1993).
"Determination of the intent of the contracting parties is to be accomplished by viewing
the contract as a whole, the subject matter and objective of the contract, all the
circumstances surrounding the making of the contract, the subsequent acts and conduct of
the parties to the contract, and the reasonableness of respective interpretations advocated
by the parties." *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221
(1973).

MOTION OPPOSING/DEFINE TRANSFER

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1 C. ALL THE CIRCUMSTANCES SURROUNDING THE CONTRACT: Osborn invented and
2 patented a fishing device and filed an additional Patent Application for an improvement of the
3 fishing device. On May 6, 2010 Osborn and Burrill entered into a License Agreement whereby
4 Burrill would sell the original and improved Device. The Plastic Injection Molds (hereafter
5 Molds) by which the Device is made is addressed in the License Agreement¹ as follows:
6

7 5. LICENSOR has paid for the manufacture of the initial prototype units and the
8 injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall
9 have the right to the full, unrestricted use of the injection molds during the term of this
10 AGREEMENT.

11 The Molds are assets of Osborn. Title to the Molds is in Osborn.

12 a. DISPUTE: A dispute occurred between Osborn and Burrill and was
13 arbitrated with an Arbitration Decision² entered May 2, 2013. The Arbitrator's decision
14 regarding the Molds was as follows:

15 The Claimant (Burrill) is entitled to full, unrestricted use of the injection
16 molds throughout the duration of the Contract;

17 The Arbitration Decision was reduced to a Spokane County Superior
18 Court Judgment on June 7, 2013 in accordance with Counsel's Proposed Judgment, stating the
19 following:
20

21 3. Seth Burrill Productions, Inc. shall have full, unrestricted use of the
22 injection molds during the term of the License Agreement, and Rebel
23 Creek Tackle, Inc. shall cooperate in the transfer and/or delivery of said
24 molds as requested by Seth Burrill Productions, Inc.

25 The words/phrase "Rebel Creek Tackle, Inc. shall cooperate in the transfer
26

27 ¹ The License Agreement is found at Exhibit 1.

28 ² The Arbitrator's decision is found at Exhibit A to the Judgment contained in Attorney
Smith's Declaration supporting the Motion for Remedial Sanctions.

1 and/or delivery of said molds” is found only in in the Judgment as entered. The words
2 are not found in the License Agreement or in the Arbitration Decision. This phrase was
3 added by Counsel and included in the Judgment but without definition.
4

5 Thus the following consideration of “all the circumstances surrounding the
6 phrase including “transfer” will include all circumstances from the negotiations between
7 Osborn and Burrill through June 7, 2013.

8 There has been consistent use, manufacturing and location of the Molds,
9 from 2009 through the execution of the License Agreement in 2010 and to the present. In
10 September, Osborn advised Burrill that Burrill was no longer a sole licensee for the product.
11 Following this Osborn had Fishing Devices made for Osborn’s sales. Otherwise, all production
12 for sales purposes had been undertaken solely for Burrill.
13
14

15
16 b. THE SINGLE MANUFACTURER OF THE DEVICE: Plastic
17 Injection Molding, owned by Mr. Ken Williams, (hereafter PIM or Williams), has been the sole
18 manufacturer of the Device. Burrill had a fishing device, separate from the Osborn Fishing
19 Device, manufactured at PIM prior to meeting Osborn. Burrill alleges that he told Osborn about
20 PIM and that PIM would be desired as a manufacturer of the Osborn fishing device.
21

22 Osborn worked with Williams and PIM for the development and
23 manufacture of the fishing device. Osborn was at the PIM facility on frequent occasions from
24 2009 through 2012. Osborn discussed the fishing device with Williams and Williams devised
25 the form of the fishing device suitable for plastic injection molding and for assembly and
26 disassembly, packaging and shipping. Osborn and Williams frequently talked via telephone
27
28

MOTION OPPOSING/DEFINE TRANSFER

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1 regarding the process of taking the fishing device from the prototype to a finished and
2 commercial product. Osborn and Williams frequently discussed, by telephone and in person,
3 changes required of the Molds in order to eliminate a slippage problem occurring in the device
4 during fishing. Williams and PIM are in the same local as Osborn.³ Osborn has a trusted
5 relationship with Williams. It was always understood that with the extent of William's
6 involvement in getting the fishing device to production, and with the close working and trusting
7 relationship between Williams and Osborn, that Williams would be the sole manufacturer of the
8 device.
9

10
11 Attorney Ivey has known Williams for years and has frequently referred
12 Patent Clients to Williams for consultation and injection molding services. Attorney Ivey has
13 frequently talked with Williams regarding the Osborn product. Attorney Ivey specifically
14 communicated with Williams regarding the quantities of fishing devices produced for Burrill and
15 concerning Mold changes required to cure Mold defects that caused fishing device slippage
16 during fishing. Williams provided invoice and other production documents that were eventually
17 used in the Arbitration. Williams provided a Declaration of his involvement in manufacturing
18 and gave testimony in the Arbitration.
19
20

21
22 c. BURRILL'S CREDIBILITY: Decades ago Osborn developed a
23 fishing device. The single prototype was lost in the weeds of Puget Sound. Osborn resumed
24 development of the fishing device in 2005, following retirement. From 2005 through 2009
25 Osborn made more than 60 different prototype fishing devices including prototypes of the
26 improved fishing device. The original fishing device was improved with the addition of a
27

28 ³ Declaration of Osborn, 11/_11_/13, found as Exhibit 2 to this memorandum.

1 discovery. A limited portion of Burrill's Discovery Production⁸, pertaining solely to the claim of
2 inventing the improved diverter fishing device, is attached. A limited portion of Osborn's
3 Discovery Production⁹, pertaining solely to the prototype development of fishing devices and the
4 improved diverter fishing device is attached as Exhibit 8 showing, by marking arrows, 11
5 examples of Diverter Fishing Devices developed by the Osborns prior to meeting Mr. Burrill.
6

7 The Court's attention is drawn to Exhibit 7 and Burrill's unqualified
8 declaration that he was the inventor of the diverter fishing device. Burrill declared that he gave
9 the idea and guidance to Osborn for the making of the diverter fishing device. Burrill's
10 Declaration predates his viewing of the multitude of Diverter Fishing Devices made by Osborn
11 before meeting Burrill.
12

13 The Court's attention is drawn to Osborn's production of photographs of
14 fishing devices, as early as 2005 and four years before meeting Burrill, which display the
15 "diverter" extending from the main fishing device body.
16

17 The Court's attention is drawn to Osborn's Discovery statement
18 describing the invention and development of the "diverter" fishing device.
19

20 Burrill's claim of any role in inventing was addressed in a Motion for
21 Summary Judgment. Burrill's claim of being the sole inventor was revised to a role of having
22 invented a particular a particular angular setting.
23

24 In the Arbitration Decision, the Arbitrator held that Burrill made no
25 inventive contribution. The Arbitrator's holding is an implicit finding that Burrill's assertions
26 were without credibility. The Arbitrator's holding "That neither Claimant [SBPI] nor Mr. Seth
27

28 ⁸ Limited portion of Burrill's Discovery Production attached at Exhibit 7.

⁹ Limited portion of Osborn's Discovery Production attached at Exhibit 8.

1 Burrill made an inventive contribution to the technology of U.S. Patent Application No.
2 12,641,291, and neither is a co-inventor;" is found at page 1 of Exhibit A to the Declaration of
3 Jeffrey R. Smith in Support of Plaintiff's Motion for Remedial Sanctions (Contempt) and other
4 Relief as filed in this matter on or about October 15, 2013. The Arbitrator's holding is an
5 implicit finding that Burrill is a liar.

7 d. BURRILL'S INTENTION: Burrill is bound by the License Agreement
8 to make quarterly sales reports and quarterly royalty payments. The reports, from the first report,
9 identified sales by customer name with sales details provided for each customer reported.
10 Osborn is aware of sales were not reported. In Arbitration, Burrill testified that his attorney, Mr.
11 Joseph Carroll, advised him that he was not obligated to report these details and that subsequent
12 reports would not provide these details.

14 Burrill's intent is to remove the Molds from Osborn and to deprive Osborn
15 with any contact with the plastic injection molding company and hence to deny Osborn any
16 manufacturing data.

18 In ages past homestead claims were described in Patents. These claims
19 were subject to the hazard of claim jumpers. The individuals proving the claim were deprived of
20 the fruit of their labors. Burrill is a "claim jumper". Burrill intends to maintain two sets of
21 books. One for the "no detail" report to Osborn but with a diminished royalty check. A second
22 set of books will be the record of actual manufacturing and sales. The increased likelihood of
23 Burrill being positioned to not report all sales will additionally reduce the value of the Patents
24 and License Agreement. This will deter others from having an interest in investing in the RCTI
25 Corporation.
26
27
28

MOTION OPPOSING/DEFINE TRANSFER

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1 Burrill is a liar. He has shown his hand by claiming to be the inventor of
2 the improved diverter fishing device, by intending to provide no sales details and by intending to
3 deprive Osborn of any contact with the manufacturer for production data.
4

5
6 **D. DEFINING "TRANSFER" BY ALL OF THE CIRCUMSTANCES:**

- 7 1. PIM and Williams were recommended to Osborn by Burrill in 2009.
8
9 2. PIM and Williams manufactured a different fishing device for Burrill.
10
11 3. Burrill trusted and relied upon PIM and Williams.
12
13 4. The Molds have been at PIM with Williams and all manufacturing of the fishing device has
14 been done at PIM since 2009.
15
16 5. Osborn is located in the local of PIM, has been at PIM many times, knows and has
17 collaborated with Williams in developing the Molds.
18
19 6. When Osborn tested the fishing device and determined that slippage was occurring during
20 fishing, Williams developed the method of adjusting the Molds and performed the adjustment.
21
22 7. Williams has always been accessible to Osborn for discussion of and action required relative
23 to the Molds.
24
25 8. Williams has at all times made production records available to Osborn relative to each part of
26 the fishing device.
27
28 9. Williams and PIM have been in business for many years.

10. Burrill's counsel's statement that "Plaintiff simply desires transfer of the plastic injection
molds so it may use a company in which it has confidence to produce its product without

MOTION OPPOSING/DEFINE TRANSFER

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1 interference from Defendant" flies in the face of Burrill's recommendation of PIM and Williams
2 and emphasis Burrill's intention of depriving Osborn of production data and committing fraud in
3 quarterly reporting. Burrill makes no criticism of the quality and timeliness of PIM's
4 performance but substantiates Burrill's intention to complete "claim jumping" through use of a
5 double set of books. Mr. Burrill, in past quarterly sales reports, failed to reveal sales made to
6 commercial customers where such sales were known to Mr. Osborn.
7

8 11. The "transfer", considering all the circumstances, should be to retain all the conditions
9 existing since 2009 with the exception of Ordering that there be no fishing devices manufactured
10 except by Burrill's instructions thereby retaining the Molds, which are the property of Osborn, in
11 circumstances known and relied up by Osborn and thereby reducing the opportunities for Burrill
12 to fraudulently hide sales and avoid making royalty payments.
13

14 12. Should Burrill be allowed to remove the Molds from PIM either to Burrill's possession or to
15 another plastic injection molding company, the limitations should meet the circumstances
16 existing at the time of the making of the contract including location at a local equally available to
17 Osborn, a company having recognition in the industry for quality, where communications are
18 assured relative to the safety, security, insurance and condition of the Molds, the enforceable
19 ability to communicate regarding flaws detected in the fishing device requiring Mold adjustment,
20 the enforceable ability to communicate and freely and accurately receive production data re: the
21 dates and quantities of all pieces manufactured, the assurance of being advised of the location to
22 which the production is transported or shipped, the reporting by Customer with detailed reporting
23 of all parts sold showing dates and sales prices. The circumstances should also recognize, the
24 evidence exhibited to this Court and as found by the Arbitrator, that Burrill lied to the Arbitrator
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12

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1 as a Tribunal leading to the conclusion that Burrill intends and plans to fraudulently maintain
2 records and fraudulently report sales and royalties.

3 13. Osborn must be assured of the ability to recover the Molds in the event of Burrill's default or
4 breach or should Burrill become incapacitated or suffer death while Osborn is without sufficient
5 records to identify and retrieve the Molds the location of the property. Osborn must not be
6 without protection should Plaintiff fail to pay any lien available to a new and unknown company.
7 A default by Burrill relative to the new plastic injection molding company housing the thousands
8 of pounds of steel comprising the plastic injection molds, without certainty of communications
9 between Osborn and a new company has the likelihood of a result of destruction or sale of the
10 Osborn's property.
11

12
13 Additionally, Burrill's intentions and credibility have been revealed by the
14 Memoranda and Declarations presented by Counsel Chris Lynch for Burrill and by Counsel Ivey
15 for Osborn during the Arbitration and recently by Counsel Smith on behalf of Plaintiff and by the
16 testimony of the Plaintiff during arbitration.
17

18 Defendant asks that the Plaintiff's Motion be Continued. In the alternative
19 Defendant asks that the Plaintiff's Motion for Contempt be denied.
20

21 Counsel Ivey, with his signature below, declares that the foregoing
22 Declarations made by Ivey are true and correct to the best of his knowledge, are made in accord
23 with the laws of the State of Washington subject to perjury.
24

25 Respectfully submitted this 11th day of November 2013.
26
27
28

MOTION OPPOSING/DEFINE TRANSFER

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IVEY Law Offices, P.S. Corp



Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Motion Opposing and Ambiguity
Case No. 13-2-01982-0

AFFIDAVIT OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on November 11, 2013 I made service of the foregoing pleading or notice on the party/ies listed below in the manner indicated:

Jeffrey R. Smith
LEE & HAYES, PLLC
601 W. Riverside Ave., Suite 1400
Spokane, WA 99201
509 324 9256
fax: 509 323 8979

US Mail
 Facsimile
 Hand Delivery
 Overnight Courier
 Email

Spokane County Superior Court
1116 W. Broadway Ave.
Spokane WA 99260

US MAIL
 EMAIL(PILKINTON)

DATED: November 11, 2013



Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Motion opposing and re: ambiguity
Case No. 13-2-01982-0

MOTION OPPOSING/DEFINE TRANSFER

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Ex1

LICENSE AGREEMENT

PREAMBLE

This License Agreement ("AGREEMENT") is entered into between REBEL CREEK TACKLE INC., a corporation which is wholly owned by Allen and Dorothy Osborn, husband and wife and is organized under the laws of the state of Washington, hereinafter referred to as LICENSOR, having its headquarters at 2107 W. 15th Ave., Kennewick WA 99337, and SETH BURRILL PRODUCTIONS, INC., a corporation organized under the laws of the state of Washington, hereinafter referred to as LICENSEE and having its primary place of business at 5113 N. Darin, Otis Orchards, WA 99027.

This License Agreement supersedes all previous offers and communications concerning United States Patent Application No. 11,290,391 and United States Patent Application No. 12,641,291, any applications which depend from U.S. Patent Application No. 11,290,391 and United States Patent Application No. 12,641,291 and any patent(s) which issue from any such applications with the stated Patent Applications and Patents hereafter identified as PATENT APPLICATIONS AND PATENTS; and

LICENSOR is the owner-assignee of U.S. Patent Application No. 11,290,391 for an invention entitled A TROLLING APPARATUS AND METHOD OF USE filed November 30, 2005 and United States Patent Application No. 12,641,291 for an invention entitled TROLLING APPARATUS AND METHOD OF USE WITH ELEVATOR AND DIVERter STRUCTURE filed December 17, 2009; The fishing devices manufactured in relation to said PATENT APPLICATIONS AND PATENTS shall be identified herein as the LICENSED INVENTION; and,

Included are any modifications of said LICENSED PATENT APPLICATIONS by means of amendments and continuation or divisional patent applications and patents derived from said LICENSED PATENT APPLICATIONS and any corresponding foreign patents from the above-referenced LICENSED PATENT APPLICATIONS or PATENTS; and

LICENSOR represents and warrants that LICENSOR has not entered into any other licenses or granted any rights to THIRD PARTIES, except as provided herein. During the term of this AGREEMENT, LICENSOR shall not enter into any other licenses or grant any rights of the LICENSED PATENT APPLICATIONS to THIRD PARTIES, except as provided herein; and

LICENSEE, in consideration of the grant of a license under U.S. Patent Application No. 11,290,391 and United States Patent Application No. 12,641,291, will pay royalties, make all necessary capital investments, and achieve PRACTICAL APPLICATION of the invention; and,

AGREEMENT; Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.

Page 1

EXHIBIT 1

LICENSOR has determined that the granting of a license to LICENSEE under U.S. Patent Application No. 11,290,391 and United States Patent Application No. 12,641,291 will provide the necessary incentive for LICENSEE to achieve the desired early PRACTICAL APPLICATION of the invention and the granting of such license to LICENSEE will therefore be in the LICENSOR'S interest;

LICENSOR and LICENSEE now agree as set forth below:

1. TERM OF THE AGREEMENT: The term of the AGREEMENT is for the life time of the stated PATENT APPLICATIONS AND PATENTS.

2. ROYALTY PAID TO LICENSOR: LICENSEE has made a preliminary estimate of the cost of producing the LICENSED INVENTION and, it is understood that the estimate has been made prior to LICENSEE expending the actual expense of manufacturing and delivering of LICENSED INVENTIONS to purchasers; and, it is understood that purchasers may include individuals as well as major international entities such as, but not limited to, major sporting goods stores. The following ROYALTY shall be paid to LICENSOR for each of the LICENSED INVENTIONS sold:

For retail sales 37% of the retail price per LICENSED INVENTION sold.

For Wholesale sales 25% of the price per LICENSED INVENTION sold.

For sales to Distributors 20% of the price per LICENSED INVENTION sold.

The retail, wholesale, or distributor price used to calculate the ROYALTY shall be exclusive of sales tax, value added tax, shipping, handling, insurance, and any and all similar taxes, expenses or charges.

An Accounting shall be made by LICENSEE and payment shall be made on a calendar quarterly basis, LICENSEE shall account separately for the gross number of LICENSED INVENTIONS sold. Retail, the gross number sold Wholesale, and the gross number sold to Distributors. Reports and all payments due shall be made within thirty (30) days of the close of the calendar quarter.

2.1 A unit shall be considered sold when payment for the unit is received by LICENSEE. In the event that any previously sold units are returned to LICENSEE for a refund from LICENSEE to the purchaser, then LICENSEE may debit the Royalties due LICENSOR in a proportionate amount or bill LICENSEE, which will be due within thirty (30) days of billing. For promotional purposes, LICENSEE may distribute a limited number of units without charge and without any royalty payments being due thereon. LICENSEE shall maintain a list of any promotional units distributed without charge and to whom the promotional units were distributed. Upon request of LICENSOR, a copy of that list shall be provided to LICENSOR by LICENSEE.

3. The FIELD OF USE of the AGREEMENT shall be limited to the use of the LICENSED INVENTION only for recreational and commercial fishing. More specifically and

AGREEMENT; Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.

Page 2

by way of example and without limiting the generality of the FIELD OF USE, the LICENSEE is authorized to sell and to authorize sales to end users for recreational fishing including sales to guides, to recreational fishing clubs, for charter fishing, to individuals, and to commercial fishing entities. More specifically and by way of example and without limiting the generality of the FIELD OF USE, this LICENSE excludes sales for military applications or uses, to any agency or branch of the Department of Defense, United States Government, or to any foreign government for military purposes. Commercial fishing is further defined as fishing for the purpose of supplying Distributor or Wholesale fish markets.

4. Upon written approval by LICENSOR, LICENSEE may grant a written royalty-bearing, sublicense under the license granted herein provided that it submits to LICENSOR a written request, in advance, for permission to grant the sublicense, including with said request a copy of the proposed sublicense. The proposed sublicense shall refer to and be generally consistent with this AGREEMENT. The proposed sublicense shall include the condition that the sublicense shall automatically terminate upon the revocation or termination of this AGREEMENT. LICENSOR'S approval shall not unreasonably be withheld.

4.1 LICENSEE shall furnish LICENSOR with a copy of the sublicense, consistent with the proposed sublicense approved by LICENSOR and executed by both LICENSEE and its SUBLICENSEE, within fifteen (15) days after the grant of the sublicense by LICENSEE.

4.2 LICENSEE shall submit to LICENSOR, for advance approval, any proposed modification of a sublicense. LICENSEE shall also submit to LICENSOR, a copy of the sublicense modification (either as an addendum or a new sublicense), consistent with the proposed sublicense modification and executed by both LICENSEE and its SUBLICENSEE, within fifteen (15) days after the effective date of the sublicense modification.

4.3 The granting of a sublicense by LICENSEE shall not operate to relieve LICENSEE from any of its obligations under this AGREEMENT.

4.4 LICENSEE shall be responsible for and remit royalties, in the same amounts and under the same terms, based upon its SUBLICENSEE's activities as if said activities were its own.

5. LICENSOR has paid for the manufacture of the initial prototype units and the injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT.

AGREEMENT: Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.

Page 3

6.

6.1 LICENSOR and LICENSEE agree that it is difficult to predict the market for the ROYALTY BASED PRODUCTS. In the event that LICENSEE fails to sell a total of fifteen thousand (15,000) units of the ROYALTY BASE PRODUCTS within the first five (5) years of this AGREEMENT, then LICENSOR may terminate this AGREEMENT by written notice to LICENSEE within thirty (30) days of the five (5) year anniversary of this AGREEMENT.

6.2 After the initial five (5) year term of this AGREEMENT, for the balance of the license period, in the event that LICENSEE fails to sell at least three thousand (3,000) units per year, then LICENSOR may terminate this AGREEMENT on thirty (30) days written notice to LICENSEE.

7.

7.1 LICENSEE shall keep full, true, and accurate records for the purpose of LICENSOR verifying LICENSEE's reports to LICENSOR, verifying LICENSEE's royalty payments to LICENSOR, and for determining LICENSEE's activities in general under the AGREEMENT. These records shall include, but are not limited to, ledgers and journals of account, customer orders, invoices, shipping documents, inventory records, computer records, purchase orders, and tax records. These records, as a whole, shall include information which will allow, at a minimum, identification of suppliers, customers, items sold or otherwise transferred, and/or services rendered, as well as whether the LICENSEE is operating within the scope of its license.

7.2 The records described in Section 7.1 shall be available for audit by LICENSOR, or by an authorized representative of LICENSOR, at all reasonable times for the LICENSE TERM and for three (3) calendar years thereafter. In addition, LICENSEE shall permit inspection by LICENSOR, or by an authorized representative of LICENSOR, of LICENSEE's assembly facilities, if applicable, and of LICENSEE's inventory of ROYALTY-BASE PRODUCTS, including parts, works-in-progress, and finished goods, during any audit by LICENSOR. In addition, LICENSEE shall arrange for inspection by LICENSOR, or by an authorized representative of LICENSOR, of any MANUFACTURER's sites including assembly facilities and inventory of ROYALTY-BASE PRODUCTS, including parts, works-in-progress, and finished goods, during any audit by LICENSOR. All audits or inspections by LICENSOR shall be at LICENSOR's expense.

7.3 If LICENSOR, as a result of an audit, discovers an underpayment of royalties which exceeds \$10,000.00 during any period of thirty-six (36) months or less, then LICENSEE shall reimburse LICENSOR for the reasonable cost of the audit, including all related costs of performing the audit (e.g., travel, food, lodging, cost of professional services, etc.). LICENSEE shall have the right to review and verify all audit results.

AGREEMENT; Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.
Page 4

8.

8.1 All disputes concerning the interpretation or application of this AGREEMENT shall be discussed mutually between the PARTIES and the PARTIES shall attempt to resolve them by agreement.

8.2 In the event of a BREACH of any provision of this AGREEMENT, the NONBREACHING PARTY shall give the BREACHING PARTY notice describing the BREACH and stating that the BREACHING PARTY has thirty (30) days after notice of the BREACH to cure the BREACH.

8.3 No cure period is required, except as may be otherwise provided in this AGREEMENT, if: (a) this AGREEMENT sets forth specific deadline dates for the obligation allegedly breached; or (b) this AGREEMENT otherwise states that no cure period is required in connection with the termination in question.

8.4 The BREACHING PARTY will be deemed to have cured such BREACH if within the cure period it takes steps reasonably adequate to alleviate any damage to the NONBREACHING PARTY resulting from the BREACH and to prevent a similar future BREACH.

8.5 If cure is not effected either PARTY may give notice requiring dispute resolution. MEDIATION may be used by the PARTIES if they mutually agree to MEDIATION. If not resolved through MEDIATION, or MEDIATION is rejected, the dispute shall be submitted to ARBITRATION pursuant to the American Arbitration Associations (AAA), Commercial Rules, but with discovery to be allowed by the arbitrator in general conformity with the Federal Rules of Civil Procedure. The prevailing party, at the discretion of the arbitrator(s), may be awarded its attorney and expert fees and costs. Arbitration will be held in Spokane County, State of Washington. Discovery will be permitted as allowed under the AAA Commercial Arbitration Rules. The arbitration decision will be final and binding and judgment thereon may be entered in any court having jurisdiction. This AGREEMENT will be interpreted and enforced in accordance with the laws of the State of Washington.

8.6 Neither PARTY shall be liable in damages or have the right to terminate this AGREEMENT for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to, Acts of God, Government restrictions (including, but not limited to, the denial or cancellation of any export or other necessary license), wars, insurrections, financial depressions, and/or any other cause beyond the reasonable control of the PARTY whose performance is affected.

AGREEMENT; Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.
Page 5

9. **ENTIRE AGREEMENT:** This agreement supersedes all oral discussions and writings and sets forth the entire agreement between the parties.

10. **AMENDMENTS:** The parties may amend this agreement in writing.

11. **NOTICES:** Any notices provided for herein shall be made in writing to Rebel Creek Tackle Inc. at 2107 W. 15th, Kennewick, WA 99337, or to Seth Burrill Productions, Inc. at 5113 N. Darin, Otis Orchards, WA 99027. Either party may change their notification address by written notice of the new address to the other party.

EXECUTION:

REBEL CREEK TACKLE INC.

BY: Allen O. Osborn
Allen Osborn, President

Date: 6-1-2010

BY: Dorothy Osborn
Dorothy Osborn, Vice President

Date: 6-1-2010

SETH BURRILL PRODUCTIONS, INC.

By: Seth Burrill
Seth Burrill, President

Date: 5-18-10

**AGREEMENT; Rebel Creek Tackle Inc
and Seth Burrill Productions Inc.
Page 6**

Ex 2

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EXHIBIT 2

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

SETH BURRILL PRODUCTIONS, INC., a)	CASE NO. 13-2-01982-0
Washington corporation,)	
Plaintiff,)	DECLARATION OF ALLEN OSBORN
vs.)	OPPOSING PLAINTIFF'S MOTION FOR
REBEL CREEK TACKLE, INC., a)	REMEDIAL SANCTIONS OF
Washington corporation,)	CONTEMPT AND SUPPORTING
Defendant)	DEFENDANT'S MOTION TO DEFINE
	"TRANSFER AND/OR DELIVERY" OF
	MOLDS TO PLAINTIFF

DECLARATION OF ALLEN OSBORN: I am an Officer of Rebel Creek Tackle Inc and the inventor of fishing devices of interest in the License Agreement of May 6, 2013.

I initially made a fishing device prototype many years ago. This prototype was lost in Puget Sound. I retired in 2005, recalled the fishing device and recommenced fishing device development. The earliest style of fishing device was patented. In 2005 I commenced development of an improvement which would divert the fishing device to the side of the direction of stream flow or boat direction. I had developed and tested the improved fishing device prior to meeting Mr. Burrill in January 2009.

Plastic Injection Molding, owned by Mr. Ken Williams, (hereafter PIM or

DECLARATION OSBORN

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1 Williams), has been the sole manufacturer of the Device. Barrill had a fishing device, separate
2 from the Osborn Fishing Device, manufactured at PIM prior to meeting Osborn. I met with Mr.
3 Williams and I worked with Williams and PIM in the development and manufacture of the
4 fishing device. I was at the PIM facility on frequent occasions from 2009 through 2012. I
5 discussed the fishing device with Williams and Williams devised the form of the fishing device
6 suitable for plastic injection molding and for assembly and disassembly, packaging and shipping.
7 Williams and I frequently talked via telephone regarding the process of taking the fishing device
8 from the prototype to a finished and commercial product. Williams and I frequently discussed,
9 by telephone and in person, changes required of the Molds in order to eliminate a shipping
10 problem occurring in the device during fishing. Williams and PIM and I are in the same local. I
11 have a trusted relationship with Williams. It was always understood that with the extent of
12 William's involvement in getting the fishing device to production, and with the close working
13 and trusting relationship between Williams and me, that Williams would be the sole
14 manufacturer of the device.

15
16
17
18 I know that Attorney Ivey has known Williams for years and has has
19 frequently talked with Williams regarding the Osborn product. Attorney Ivey specifically
20 communicated with Williams regarding the quantities of fishing devices produced for Barrill and
21 concerning Mold changes required to cure Mold defects which caused fishing device shipping
22 during fishing. Williams provided invoice and other production documents to attorney Ivey
23 which were eventually used in the Arbitration. Williams provided a Declaration of his
24 involvement in manufacturing and gave testimony in the Arbitration.

25
26
27 My wife and I worked together in developing the fishing devices. We
28

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1 were both astonished when Burrill claimed that he had invented the improved fishing device.
2 His claim is an absolute lie. We improved the original fishing device with the addition of a
3 diverter which caused the fishing device to move to the side of the direction of stream flow or
4 boat direction. The initial prototype of the diverter fishing device was made in 2005 with others
5 following into 2009. I made and tested initial diverter fishing devices prior to meeting Burrill in
6 about January 2009. The diverter fishing device was not revealed to Burrill at the initial meeting
7 in 2009. I undertook additional testing of the diverter fishing device before inviting Burrill to
8 view the diverter fishing device in operation in about February-March 2009. I had undertaken all
9 inventive steps and testing of the diverter fishing device before meeting Burrill. Burrill was
10 unaware of the extent of prototype development and testing until we exchanged discovery in
11 the Arbitration with that exchange in early 2013.

12
13
14 I could not believe that Burrill continued his claim of inventing after
15 seeing the work I had done since 2005. Photographs of my prototypes are produced with the
16 diverter occurring as early as 2005 and four years before meeting Burrill. Photographs, which
17 display the "diverter" extending from the main fishing device body, are seen in the Exhibit.

18
19 Burrill's initial claim of being the sole inventor was revised to a role of
20 having invented a particular angular setting. I had already tested the diverter fishing device at
21 the angles claimed by Burrill, before meeting Burrill. Burrill didn't invent any aspect of the
22 fishing device.

23
24 Burrill is bound by the License Agreement to make quarterly sales reports
25 and quarterly royalty payments. The reports, from the first report, have identified each customer
26 and the sales details to each customer. In Arbitration, Burrill testified that his attorney, Mr.
27
28

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1 aware of Mr. Burrill's counsel's statement that "Plaintiff simply desires transfer of the plastic
2 injection molds so it may use a company in which it has confidence to produce its product
3 without interference from Defendant". That statement does not fit with Mr. Burrill's
4 recommendation of PIM and Williams. That statement does support the expectation that Mr.
5 Burrill has the intention of keeping production data and from me so that he can falsely make
6 quarterly reporting. Mr. Burrill's reason for taking the Molds from PIM does not suggest a
7 problem with quality and timeliness of production. I am aware of sales made in past quarters
8 which were not accounted for in quarterly sales reports
9

10
11 My wife and I understand that there will be none of the Fishing Devices
12 made for Rebel Creek Tackle Inc. in light of the Arbitration Decision, so long as Mr. Burrill
13 complies with the License Agreement. But manufacturing and production information is of great
14 importance to us as a primary means of reducing the opportunities for Mr. Burrill to fraudulently
15 hide sales and avoid making royalty payments.
16

17 I am aware, from my attention to the required storage and maintenance of
18 Molds by plastic injection mold companies, that costs are realized by injection mold companies
19 in their keeping of Molds. I am aware that some act by Mr. Burrill or some condition
20 experienced by Mr. Burrill could result in conflict with an injection mold company. Rebel Creek
21 Tackle Inc and I must be able to recover the Molds if default or breach or should occur or should
22 Mr. Burrill become incapacitated. We must have certainty in contact with the injection mold
23 company so that we can at all times know the location of the Molds and be able to identify and
24 retrieve the Molds should something happen. I must be able to know the relationship between
25 Mr. Burrill and an injection mold company should a lien arise. A default by Burrill relative to
26
27
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1 PIM or any injection molding company which is housing the thousands of pounds of steel
2 comprising the Molds makes possible the destruction or sale of the Osborn Molds.

3 This Declaration is made by Allen Odah Osborn subject to the laws of the
4 State of Washington and subject to perjury with all statements being true to the best of my
5 knowledge. Signed this ____ day of November, 2013.
6
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9

10 

11 Allen Odah Osborn
12
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16

17 **AFFIDAVIT OF SERVICE**

18 I hereby declare, under penalty of perjury under the laws
19 of the State of Washington, that on November____, 2013 I made
20 service of the foregoing pleading or notice on the party/ies
21 listed below in the manner indicated:

22 Jeffrey R. Smith US Mail
23 LEE & HAYES, PLLC Facsimile
24 601 W. Riverside Ave., Suite 1400 Hand Delivery
25 Spokane, WA 99201 Overnight Courier
26 509 324 9256 Email
27 fax: 509 323 8979

28 Spokane County Superior Court US MAIL
1116 W. Broadway Ave. EMAIL (PILKINTON)
Spokane WA 99260

DECLARATION OSBORN

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DATED: November _____, 2013



Floyd E. Ivey, WSBA #6888
Attorneys for Defendant
REBEL CREEK TACKLE, INC.
Motion Opposing and re: Ambiguity
Case No. 13-2-01982-0

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Ex 3

1 **EXHIBIT 3**

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6 **AMERICAN ARBITRATION ASSOCIATION**

7
8 **SETH BURRILL PRODUCTIONS, INC., a**
9 **Washington corporation,**

DEMAND FOR ARBITRATION

10 **Claimant,**

11 **vs.**

12 **REBEL CREEK TACKLE, INC.,**

13 **Respondent.**

14
15
16 **I. The Parties**

17 1. **Plaintiff/Claimant Seth Burrill Productions, Inc. (SBP) is a Washington**
18 **Corporation in active standing.**

19 2. **Seth Burrill is an officer and director of SBP. Mr. Burrill is an accomplished**
20 **professional fisherman; SBP is his corporate entity. Mr. Burrill works as a fishing instructor;**
21 **he hosts fishing television programs and instructional videos; and he owns and operates a**
22 **fishing tackle retailer and distributor.**

23
24 3. **Defendant/Respondent Rebel Creek Tackle Inc. (RCT) is a Washington**
25 **Corporation in active standing.**

DEMAND FOR ARBITRATION - 1

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1 4. Allen and Dorothy Osborn are officers and directors of RCT.

2 **II. The License Agreement Between the Parties**

3 5. SBP and RCT entered into a License Agreement on or about June 1, 2010. A
4 copy of the License Agreement is attached hereto as Exhibit 1. This Arbitration is filed
5 pursuant to Section 8 of the License Agreement. Section 8 designates Spokane, Washington as
6 the place for Arbitration.

7 6. Under the License Agreement, RCT grants exclusive rights in certain fishing
8 technology to SBP – and SBP pays RCT a royalty for devices sold. The exclusively licensed
9 technology surrounds the notion of a “trolling diver” that allows fishing bait to be maintained at
10 depth while trolling. RCT (or the Osborns) have filed certain patents and patent applications
11 covering the technology of the License Agreement.

12 7. For example, the Preamble of the License Agreement appoints SBP as the
13 Exclusive Licensee of U.S. Patent Application No. 11,290,391. This application has now
14 issued as U.S. Patent No. 7,654,031 (the ‘031 Patent), attached hereto as Exhibit 2.

15 8. The License Agreement also appoints SBP as the Exclusive Licensee of U.S.
16 Patent Application No. 12,641,291 (the ‘291 Application). The ‘291 Application remains
17 pending with the USPTO, and is attached hereto as Exhibit 3. The ‘291 Application, however,
18 is likely defective under 35 U.S.C. Section 115 for failure to include Mr. Burrill as a named co-
19 inventor. The ‘291 Application (and any resulting U.S. Patent) may be invalid for this reason.
20
21

22 **III. The Working Relationship Under the License Agreement**

23 9. As exclusive licensee, SBP purchased the parts for its inventory from Plastic
24 Injection Molding, Inc. (PIM) of Richland, Washington which currently has physical control
25

DEMAND FOR ARBITRATION - 2

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1 over the molds for making the devices. Pursuant to Section 5 of the License Agreement, SBP
2 is to have "full, unrestricted use" of the molds.

3 10. SBP takes these molded parts from PIM (plus other stock parts) and performs
4 the final assembly of the trolling devices at its Spokane, Washington area headquarters. SBP
5 packages the devices and labels them for retail sale.

6 11. SBP has used the trademark "BUD'S DIVER" for the devices. SBP has
7 trademark priority over the term BUD'S DIVER, which it has used in its packaging, on the
8 devices, on SBP's website, videos, promotional materials, and on a special website SBP
9 acquired for the device at SBP's URL <http://www.budsdiver.com>.

10 12. SBP has created original artwork and materials covered by U.S. Copyright
11 which is packaged and shipped with the devices and which is also used on the
12 www.budsdiver.com website.

13 13. After final assembly and packaging of the BUD'S DIVER devices, SBP
14 distributes them through various channels: at retail, through wholesalers, and through
15 distributors.

16 14. The License Agreement calls for a royalty to be paid from SBP to RCT of each
17 device sold (reported and paid quarterly): 37% for retail sales, 28% for wholesale sales, and
18 26% for distributor sales.

19
20
21 **IV. RCT Interferes with the License Agreement**

22 15. For reasons unknown, RCT has taken several steps to interfere with the working
23 relationship with SBP under the License Agreement. This improper interference has now
24 resulted with RCT purporting to terminate the License Agreement and denying SBP access to
25

DEMAND FOR ARBITRATION - 3

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1 its orders for inventory. RCT had no right or authority to interfere with the License Agreement
2 or to terminate it. RCT's improper interferences and the improper terminations are un-cured
3 material breaches that have damaged SBP and caused it irreparable harm. There are several
4 instances of material breach and improper interference by RCT in the past 18 months, some
5 identified immediately below.

6 16. RCT colluded with PIM to change the master molds such that newer parts
7 purchased by SBP are not compatible with older parts purchased by SBP.

8 17. RCT and its counsel purported to terminate the exclusivity of SBP in the
9 License Agreement, even though the License Agreement has no provision by which to
10 terminate exclusivity, and even though SBP was in full material compliance with the License
11 Agreement.

12 18. Following the baseless termination of exclusivity, RCT and its counsel
13 purported to terminate the entire License Agreement, even though SBP was in full material
14 compliance with the License Agreement.

15 19. RCT and its counsel have refused to acknowledge SBP's rights under the
16 License Agreement and have refused to cure RCT's material breaches of the License
17 Agreement (i.e. the improper termination) within the timeframes established by Section 8 of the
18 License Agreement. These refusals necessitate this Arbitration.

19 20. RCT and its counsel colluded with PIM and ordered it not to do business with
20 SBP, despite Section 5 of the License Agreement which allows SBP to control the molds, and
21 despite knowledge of pending and desired orders by SBP.

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DEMAND FOR ARBITRATION - 4

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1 21. RCT colluded with PIM to produce colored versions of the trolling divers (the
2 original divers are black in color.) Despite SBP's exclusive rights under the technology, RCT
3 has sold these devices directly and has placed others into commerce knowing they were to be
4 sold. Because SBP is the Exclusive Licensee of the technology, not only are RCT's sales of the
5 colored devices a material breach of the exclusivity granted to SBP, but they are sales which
6 infringe SBP's exclusive rights in the '031 Patent (and SBP's exclusive rights as to the '291
7 Application, if any.)

8
9 22. RCT colluded with retailers in Washington State to replace the black devices in
10 packages delivered by SBP with the colored, infringing devices delivered by RCT. RCT has
11 also undertaken to sell, and induced others to sell these colored, infringing devices to retailers
12 and consumers, without any right or authority from SBP.

13 23. RCT has sold (and induced the sales of) these colored, infringing devices under
14 the trademark "BUD'S DIVER", without any trademark priority rights, or right or authority
15 from SBP.

16
17 24. RCT has sold (and induced the sales of) these colored, infringing devices with
18 the URL www.budsdiver.com molded into them, without any trademark priority rights, or right
19 or authority from SBP.

20 25. RCT has sold (and induced the sales of) these colored, infringing devices using
21 SBP's copyrighted packaging and marketing materials, without any right or authority from
22 SBP.

23
24 26. RCT has sold (and induced the sales of) these colored, infringing devices using
25 SBP's trade secrets, misappropriated from the sales reports SBP has provided to RCT.

DEMAND FOR ARBITRATION - 5

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1 27. RCT has made these infringing sales without proper business licensure and
2 without collecting or paying appropriate taxes.

3 28. The actions of RCT and its counsel have deprived SBP of the benefit of its
4 contractual bargain, resulting in lost sales, lost market share, lost opportunities, attorneys' fees
5 expenditures, and damages for the patent, trademark and copyright infringement by RCT and
6 its agents and affiliates.

7 **V. Mr. Burrill is an Unnamed Joint-Inventor of the '291 Application**

8
9 29. The '291 Application is entitled "Trolling Apparatus And Method of Use With
10 Elevator And Diverter Structure." RCT's counsel prepared and filed the '291 Application. The
11 '291 Application identifies Mr. and Mrs. Osborn as the joint-inventors.

12 30. Mr. Burrill, however, had the concept of the diverter that is inherent in the
13 Claims of the '291 Application (e.g. Claim #21) and Mr. Burrill helped reduce the invention to
14 practice by perfecting the angles of the diverter inherent in the Claims of the '291 Application
15 (e.g. Claims #28 and #29.) Consequently and under U.S. Patent Law, Mr. Burrill is a joint-
16 inventor of the subject matter of the '291 Application.

17
18 31. Under the law, 35 U.S.C. Section 262, in the absence of an agreement to the
19 contrary, joint-inventors each own the patent rights without an obligation to account to the
20 other joint-inventors. Under the License Agreement, RCT has granted an exclusive license to
21 SBP, but the License Agreement is silent as to SBP's rights as an inventor.

22 32. SBP has made RCT and its counsel aware of RCT's failure to identify Mr.
23 Burrill as a joint-inventor, but RCT and its counsel have ignored the information and have
24 failed to take any actions to correct the '291 Application.
25

DEMAND FOR ARBITRATION - 6

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VII. Prayer for Relief

1
2 Plaintiff SBP requests the following relief:

3 1. For an Order to RCT to release the molds from PIM for the use by SBP.

4 2. For an Order that RCT is not allowed to use these molds, during the term of the
5 License Agreement.

6 3. For an Order that RCT is not allowed at any time (i) to use the BUD's DIVER
7 trademark (or any confusing similarity), (ii) to use SBP packaging or marketing materials, (iii)
8 to use the trade secrets of SBP.
9

10 4. For an Order that RCT is to recover and destroy the infringing devices from
11 those retailers where RCT has delivered it, in addition to a proper explanation to those retailers
12 that SBP is the legitimate exclusive licensee of the technology.

13 5. For an Order to RCT to include Mr. Burrill as a joint-inventor on at least the
14 '291 Application and any foreign or related applications.

15 6. For an order to RCT to pursue all U.S. and foreign patent applications on the
16 trolling diver technology and to maintain same.
17

18 7. For an Order to RCT to provide an accounting for its infringing sales and the
19 infringing sales of its agents and affiliates.

20 8. For an Order re-instating the License Agreement as if it had never been
21 terminated, but (i) provided that SBP be allowed 24 additional months to meet the 15,000 unit
22 minimum sales of Section 6.1 (thereby delaying Section 6.2 by those same 24 additional
23 months), and (ii) establishing new royalty rates to reflect Mr. Burrill as a joint-inventor of the
24 '291 Application: 7.5% for retail sales, 5% for wholesale sales, and 2.5% for distributor sales.
25

DEMAND FOR ARBITRATION - 8

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9. For a Judgment awarded to SBP against RCT and its principals: (i) for SBP's lost sales and opportunities, (ii) disgorging any monies made by RCT for its infringing sales and the sales of its agents and affiliates, (iii) trebling all monetary awards under the law, and (iv) awarding costs and a reasonable attorneys fee. Any Judgment awarded should be subject to a set-off of \$1182.75 for the royalty for Quarter 3, 2012 which has been withheld under protest pending this Arbitration.

DATED this 6th day of November, 2012.

LEE & HAYES, PLLC

By: 

CHRISTOPHER LYNCH, WSBA #17462
VANESSA R. WALDREF, WSBA #44396
Attorneys for Claimant

DEMAND FOR ARBITRATION - 9

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Ex 4

EXHIBIT 4

AMERICAN ARBITRATION ASSOCIATION

**SETH BURRILL PRODUCTIONS, INC., a
Washington corporation,**

Claimant,

vs.

REBEL CREEK TACKLE, INC.,

Respondent.

CASE NO. 75 133 00423 12

**DECLARATION OF J. CHRISTOPHER
LYNCH IN SUPPORT OF CLAIMANT'S
RESPONSE TO RESPONDENT'S
"MOTION" DATED APRIL 26, 2013**

I, J. Christopher Lynch, declare as follows:

1. I am the lead counsel for Seth Burrill Productions, Inc. ("SBP") in this matter. My associate Vanessa Waldref, my legal intern Bradley Tubbs, and our IP and Litigation paralegals Annie Haley and Julie Sampson assisted me in the case. I submit this Declaration in Opposition to Respondent's "Motion" for reconsideration. This Declaration includes some express comments by me to Mr. Burrill in order to respond to respondent's Motion, but no other attorney-client privilege is waived hereby.

2. I resent the tone of Rebel Creek Tackle, Inc.'s ("RCT") "Motion" filed after 7:00 p.m. PDT, on Friday, April 26, 2013. RCT's counsel calls into question my ethics, my preparation, my interviewing skills, my legal analysis, my briefing, my discovery, and just about everything else we did in the case. He also calls Mr. Burrill a "liar" and argues that I was complicit in suborning perjury on the witness stand. Mr. Burrill told the truth as the Arbitrator

DECLARATION OF J. CHRISTOPHER LYNCH - 1

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could plainly see. I never arranged for any testimony which I knew to be false, and I never would do so.

3. It is highly unfortunate to be forced to spend more of my client's money in responding to RCT's counsel's improper "Motion", but I feel I have no option other than to prepare a substantive reply.

4. I admit that I was the person who first raised the issue of "un-named co-inventor" both with RCT and with Mr. Burrill. In reviewing the file, I realized that SBP was paying a steep royalty for the Exclusive License of two patents. The Supreme Court's *Lear v. Adkins* case *absolutely allows* patent licensees to challenge patents (even if the license expressly prohibits such a challenge, and this one did not have any such prohibition) — because licensees are in the best position to ferret-out invalid patents and, under the law, no royalty needs to be paid for a patent held to be invalid. So in interviewing Mr. Burrill, it was apparent to me that he in fact did make a significant technological contribution to the "diver with diverter" and further study led me to the '291 Application with its claim language right on the points that Mr. Burrill identified that he had made. I raised these issues with counsel for RCT who promised a substantive reply, but it was never forthcoming.

5. I was suspicious that a party like RCT which had so callously terminated the License Agreement without any right to do so, and which I had already proven had not assigned the patents into the Licensor of the License Agreement, might have in fact secured a high royalty rate from SBP without ever telling SBP that its contribution to the technology was in the patent application filed in December 2009.

6. Yes it is true that Mr. Burrill at the time never claimed to be a co-inventor, but there is no evidence that RCT ever shared the patent application with SBP! In other words, even

DECLARATION OF J. CHRISTOPHER LYNCH - 2

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if SBP could have understood that the application included the "9-and-9" angles buried in Claims 28 and 29 that Mr. Burrill testified to suggesting, it was never shown to SBP. Indeed, the '291 Application did not even become public record until late 2010 when it was first published by the USPTO, but after the License Agreement was signed.

7. I never suggested to Mr. Burrill to try to claim sole ownership of the '291 Application – I told him that (i) incorrect inventorship can be corrected at the USPTO (even as to applications) by honest applicants who made a mistake, and (ii) incorrect inventorship cannot be corrected at the USPTO by dishonest applicants. I had no specific evidence that RCT was dishonest about this issue of inventorship (e.g. it might have been an honest mistake not to interview or include Mr. Burrill), so I raised the issue with RCT's counsel in the hopes (i) that the application could be corrected, or (ii) that I could be convinced that Mr. Burrill was in fact not an inventor, despite the technical contribution he made that is in Claims 28 and 29 of the '291 Application. But I never got any substantive reply regarding the issue and never got any "Yes, maybe I should interview Mr. Burrill now that I know more about his technical contribution" reply.

8. In discovery, RCT took the position that it had invented its diverter prior to 2009, but SBP continued to hearing on the point, because: (i) I was suspicious that the '291 Application came so late in 2009, after the work with Mr. Burrill, and (ii) I was suspicious that the '291 Application included detailed claims like Claims 28 and 29 that covered angles that RCT's pre-2009 devices could not physically make (e.g. differing angles to the bridge and the diverter). RCT's behavior throughout the arbitration confirmed my suspicions that RCT was trying to hide from this issue that could have exposed it for securing a high royalty deal without telling SBP that the '291 Application included its contributions. Indeed, the fact that RCT never

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came to market until working out the design with Mr. Burrill was proof to me that there was a viable issue of co-inventorship.

9. I reviewed RCT's authority on the point and concur that there is no civil cause of action against the USPTO for correction of patent applications. There is, however, a process for cooperative correction of patent applications – this is the process I wanted RCT to consider, i.e. “let's talk about Seth's contribution and then correct the patent now before it causes problems” – and this is the process I asked to Arbitrator to employ under its equitable powers.

10. There is a civil cause of action for correction of issued patents. There is a civil cause of action for cancellation of issued patents. There is a process for an un-named co-inventor to file his own patent application, drawing an Interference at the USPTO. I explained all of these options to the Arbitrator during the hearing on summary judgment regarding jurisdiction, but indicated our preference was to have the Arbitrator simply order the applicant to consider inventorship and amend the '291 Application accordingly. Similarly, SBP asked the Arbitrator to order RCT to assign the patents into RCT (which has apparently has not yet been completed.)

11. The majority of Claimant's case was to show the serious breaches of the License Agreement. The co-inventorship issue was a concern, because it was a warranty in the agreement, just like the warranty that RCT owned the patents. So of course SBP raised the issue, but we did so in a way to try to minimize its impact – that is, SBP pushed for a resolution that would lead to validity rather than one that would lead to invalidity. Indeed, Claimant even suggested an avenue for resolution of the inventorship issue that could have allowed RCT's counsel to make the decision (in good faith.)

DECLARATION OF J. CHRISTOPHER LYNCH - 4

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12. I know that I never violated FRCP 11, CR 11 or RCP 3.3. I investigated the facts and I presented the facts. I investigated the state of the law and urged compliance with the law. I acknowledged the limitations of any court to tell the USPTO what to do, but recognized that Arbitrators can tell parties what to do, and found and cited authority that authorizes Arbitrators to tell parties what to do at the USPTO to fix problems. Indeed, RCT's 17 pages of venom appear not to challenge the Arbitrator's ordering RCT to change ownership into itself, even though there appears to be no express cause of action which would allow a licensee to sue the USPTO for such a result.

13. RCT was warned about the cost of arbitration and that SBP would be seeking specific performance, even though the filing fee for that was three times the normal filing fee – because specific performance was the only way to make SBP whole. Despite these warnings, RCT continued to deflect any substantive discussion toward resolution, forcing the hearing. Indeed, SBP prevailed on specific performance, securing an Award to get the molds and to get the patent assignments fixed.

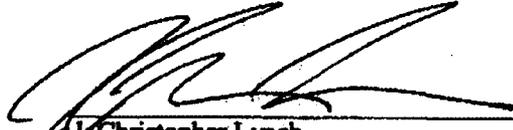
14. I have spent five and one-half hours today Monday April 29, 2013 reading the 17 page "Motion," reviewing the timeline and files, reading some of RCT's cases, and preparing this response Declaration and Memorandum. Because RCT's "Motion" was untimely and wholly improper, SBP requests (i) that it be Awarded the relief sought in its attorneys' fees request, including control of the inventory under Osborn's control, and (ii) that it be awarded attorneys' fees in the amount of \$2,500.00 for this response which never would have been necessary had RCT complied with the Interim Award and the AAA rules.

DECLARATION OF J. CHRISTOPHER LYNCH - 5

LEE & HAYES, PLLC
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Spokane, Washington 99201
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15. I would be happy to provide any additional information or responses to RCT's "Motion" as the Arbitrator deems appropriate.

DATED this 29th day of April, 2013, in Spokane, Washington.



J. Christopher Lynch

DECLARATION OF J. CHRISTOPHER LYNCH - 6

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Ex 5

EXHIBIT 5

ARBITRATION OF SBPI V. RCTL, AAA 75 133 00423 12

RESPONDENT'S MOTION FOR RECONSIDERATION AND RESPONSE TO THE INTERIM DECISION

ARBITRATION IS SUBJECT TO CR 11 AND RPC 3.3

Civil Rule 11 makes the signature of an attorney a certificate that to the best of the attorney's knowledge...formed after an inquiry reasonable ...[that for the subject matter of the document signed] (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. ... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court...upon its own initiative, may impose upon the person who signed it...an appropriate sanction...

Washington RPC Rule 3.3. is titled Candor Toward the Tribunal assets that (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; (4) offer evidence that the lawyer knows to be false... (c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6. (d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16. (e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Tribunals have broad fact-finding powers in testing the factual and legal grounds for evidence and assertions made for its consideration in assuring that justice is done. See *Cooter & Gell*, 110 S.Ct. at 2457-2461. When a reviewing entity is uncertain of the Tribunal's reasoning, or when a reviewing entity cannot discern whether the Tribunal considered the relevant factors, the reviewing entity must remand. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1366 (9th Cir. 1990)

The nature of the Tribunal inquiry contemplated by the Supreme Court in *Cooter & Gell*, is characterized by the Court as "[t]he issues involved in determining whether an attorney has violated Rule 11 ... involve fact-intensive close calls." 110 S.Ct. at 2460 (citations and internal quotations omitted). We believe that this kind of inquiry both adequately addresses the concern that Rule 11 will be used to chill vigorous advocacy and at the same time adequately serves the Rule's central purpose of deterring abusive litigation tactics." *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1364 (9th Cir. 1990)

The Washington Court of Appeals noted that "The principal concern of ...Rule 11...is whether the attorney acted reasonably in taking the action. See *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987)." The Tribunal's function is to "...inform itself and make findings as to the inquiry undertaken by the nonmoving party. The court's focus should begin with the language of the rule itself and center on the attorney's: "knowledge, information, and belief, formed after reasonable inquiry ..." CR 11. *Doe v. Spokane and Inland Empire Blood Bank*, 780 P.2d 853, 55 Wn.App. 106, 110-114, (Wash.App. Div. 1 1989)

.....

THE INTERIM DECISION

The Arbitrator's Interim Decision has not addressed the evidence and testimony presented by the Claimant in light of the imperatives of CR 11 and RPC 3.3.

The Arbitrator's Interim Decision has found that Claimant Mr. Burrill was not an inventor.

The Arbitrator's Interim Decision has found that the Osborn's were not authorized to terminate the Exclusive License held by Mr. Burrill and awards damages to Mr. Burrill.

The Interim Decision ignores the fact of separate claims asserted in the Arbitration Demand and the factual and legal issues which the Arbitrator is compelled to address.

THE ARBITRATION DEMAND

The Claimant, by Mr. Lynch's signature, crafted two distinct claims in the Arbitration Demand. One was specific to Mr. Burrill's assertion of inventorship and hence ownership of the "diver-diverter" invention which is the subject of the License Agreement.

The second was specific to the termination of the Exclusive License and to Damages.

The role taken by the Osborn's in selling was limited to 6 sales made in late 2012. The Osborn's terminated sales activity when Mr. Burrill's Arbitration Demand was filed. There was nothing regarding the Osborn's, which was presented in the Arbitration hearing, which was not revealed in the Osborn's Response to Claimant's Discovery. The Osborn's activity of sales, purchase of inventory, use of packaging including artwork and the use of "Buds Diver" was fully disclosed in Osborn's Response to Claimant's Discovery.

THE PRIMARY FOCUS OF THIS ARBITRATION

The effort in this case was primarily related to Mr. Burrill's claim of Inventorship and hence Patent Ownership. The Arbitration Demand, signed by Mr. Lynch, asserted that Mr. Burrill had the concept, helped reduce to practice and perfected the angles of the diverter at 30; that as a joint inventor Mr. Burrill owned the patent rights at 31; that Respondent was obligated to correct the inventorship to show Mr. Burrill as an inventor with the Patent Office at 32, 33 of the Arbitration Demand.

The Osborn's' Response to the Arbitration Demand first refuted the authority of Arbitration to make an Inventorship determination citing the Federal Statute and Case Law reserving Inventorship decisions, for pending Patent Applications, to the Director of the Patent and Trademark Office. Mr. Lynch drew the Arbitrator into consideration of doing what was not permitted to Federal Judges. Federal Judges have the capacity to address Inventorship after a Patent is issued but are precluded from such power while a Patent Application is pending.

Upon conclusion of Discovery the Osborn's' moved for Summary Judgment on the Inventorship issue with Mr. Lynch citing to the Arbitrator authority pertaining to issued Patents and not to pending Patent Applications.

Requesting an Arbitrator to perform what a Federal Judge cannot accomplish is Clear and Convincing evidence of the nonexistence of the legal basis for what Mr. Lynch requested of the Arbitrator. That demand, without legal authority, required a FRCP 11 or CR 11 examination.

The occurrence of such an event compels the Tribunal - the Arbitrator, to address the matter. Yet the issue was disposed of by the Arbitrator in two sentences concluding only that Mr. Burrill was not an inventor. There was no CR 11 or RPC 3.3 finding.

The Inventorship Issue occupies a position of prominence requiring heightened consideration. Here CR 11 is prominent in light of the lack of both factual and legal grounds. The lack of factual grounds became ever more obvious as

Burrill's false and separately in allowing a witness to knowingly present false testimony to a Tribunal.

FED. R. CIV. P. 11 AND CR 11 AUTHORITY

FIRST WASHINGTON AUTHORITY

The signature of a party or of an attorney constitutes a certificate by him that he has read the pleading, motion, or legal memorandum; that to the best of his knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

The determination whether a violation of CR 11 has occurred is vested in the sound discretion of the trial court. *Cooper v. Viking Ventures*, 53 Wash.App. 739, 742, 770 P.2d 659 (1989). If the court determines that a violation has occurred, the rule makes the imposition of sanctions mandatory. *Miller v. Badgley*, 51 Wash.App. 285, 301, 753 P.2d 530 (1988). The trial court, however, retains broad discretion regarding the nature and scope of sanctions, which could range from a reprimand to the full award of attorneys fees and other appropriate penalties. *Badgley*, at 303, 753 P.2d 530.

A plaintiff's complaint may subject that party to CR 11 sanctions if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal [780 P.2d 857] basis of the action. CR 11. The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Badgley*, at 299-300, 753 P.2d 530.

Doe v. Spokane and Inland Empire Blood Bank, 780 P.2d 853, 55 Wn.App. 106, 110-111, (Wash.App. Div. 1 1989).

Doe, supra, imposes mandatory action by the Judicial Officer where a violation occurs. Consideration of Inventorship by other than the Director of the Patent and Trademark office is precluded by Federal Statute. There was no legal

basis for the assertion of Inventorship in this matter. CR 11 was triggered by this assertion.

SECOND. FEDERAL AUTHORITY

Rule 11(b) requires an attorney to conduct a reasonable inquiry into the law and facts before filing a pleading in a court and to certify that the claims contained therein are not frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose. Rule 11(c) then permits a district court to impose sanctions on a party and its attorneys for violation of subdivision (b).

Q-Pharma, Inc. v. Andrew Jergens Co., 360 F.3d 1295, 1300, (Fed. Cir. 2004)

ISSUES RAISED BY MR. BURRILL'S CLAIM OF INVENTORSHIP

Mr. Burrill's claim of Inventorship and hence ownership raises four distinct issues.

THE FIRST ISSUE

The First Issue is addressed in the foregoing section - namely the nonexistence of legal authority allowing any other than the Director of the Patent Office to make Inventorship determinations in a pending Patent Application.

THE SECOND ISSUE

The Second Issue first issue focuses on Mr. Burrill's presentation of patently false testimony which first addressed Inventorship and then carried over into his License and Damage Claims.

THE FEDERAL HOMESTEAD ACTS

In the mid 1800's and into the early 1900's, the western United States was unsettled. A "Free Soil" movement was encouraged and Homestead Acts were passed. People came west, cleared rocks and trees, plowed, sowed, harvested and built and lived in a house. When they had proved their Homestead they did not receive a Deed. The United States awarded them a Patent showing the boundary of their land. The term Deed is synonymous with the term Patent.

Some individuals tried to gain the fruit of the labor of a Homesteader by falsifying documents, making up testimony, preparing witnesses and taking other steps to steal the homestead. These "Claim Jumpers" were sometimes successful and at other times were shot.

Seth Burrill is the modern day "Claim Jumper". His testimony in Declaration and at the hearing was filled with lies.

Mr. Burrill contended in Declarations in 2012 and 2013 that in February or March 2009, at Rock Lake, that he was the inventor and conceiver of and perfecting critical angles of the diver relative to the diverter.

But Mr. Burrill's September 2009 email, RCTI A250-20 and SBPI 366, illustrated that months after the Rock Lake trip he was unaware of those "critical angles" – the "double 9's". The Arbitrator and counsel for Mr. Burrill were enlightened by Mr. Burrill's email stating that "...The bridge is set at a 9 degree down angle and the diverter is set at a 9 degree inside angle...".

The bridge angle is not one of the "double 9" angles.

Mr. Burrill's witness, Mr. Van Valin, whether complicit or not, recited Mr. Burrill's words of "Crank Bait Bill" pointing to and referencing to the "Bridge" portion of the "diver-diverter". Mr. Burrill's words, his witness's words and the September 2009 email demonstrated that Mr. Burrill did not know the "double 9 angles", the "Invention Angles" of consequence in February of 2009.

Rather than showing evidence of the "double 9" invention in February 2009, the testimony illustrated that Mr. Burrill was addressing a 9 degree down angle at the Bridge as late as September 2009.

THE BURDEN FOR THE ARBITRATOR – THE BURDEN FOR THE OSBORNS – THE MANDANTORY ACTION REQUIRED OF THE ARBITRATOR

In what ways does Mr. Burrill's failed attempt to claim Inventorship impact this Arbitration? In the contemporaneous exchange of Discovery Mr. Burrill claimed that he was the person who Conceived of the Diverter. He claimed sole responsibility for the Diverter structure which was a "double 9". In that same discovery exchange, where Mr. Burrill claimed Conception in 2009, the Osborn's revealed photographs from as early as 2005 demonstrating the "Diver-Diverter" prototype having the "double 9" angular relationship between diver and diverter.

Mr. Burrill's "double 9" could have been an original concept but for his utter ignorance of where the angles were as revealed in the September email. Thus the "double 9" and "conception" claims were false. The "double 9" and "conception" claims from February 2009 were lies by Mr. Burrill. This testimony, in Burrill Declarations and at the hearing, was permitted by counsel.

Responding to Osborn's Motion for Summary Judgment on the Inventorship issue Mr. Lynch stated at page 2 that "Mr. Burrill's Declaration explains his contributions to the various angles and relative positioning of the parts to make it work." and at page 4 "Here the testimony will show that Mr. Burrill made contributions to the relative positions and connections of the elements of the '291 Application..."

Mr. Lynch introduced the topic of Mr. Burrill's inventive contributions, in the Lynch Memorandum Opposing the Motion for Summary Judgment, without explicit acknowledgment of the text and photographic evidence of the 2005 Osborn Prototype. Mr. Lynch simply said, at page 1, that "Claimant acknowledges that Mr. Burrill had no inventive influence on the Osborn's before ...2009." and at page 2 that "Mr. Burrill was....instrumental in the conception of the final designs of the "diver with diverter" ...[and that he] proposed ideas for alignment of a diverter structure to a diver structure..."

At this point in the Arbitration the broad scope of power of examination by the Arbitrator was appropriate. The Tribunal was obligated to inquire regarding the grounds of fact and law which was being presented by Claimant. Did Mr. Lynch not have in mind the September 2009 email at SBPI 366? Had Mr. Lynch not interviewed Mr. Van Valin? Did Mr. Lynch not ask about the CRANK BAIT BILL which was at the bridge of the "diver-diverter" and at 9 degrees? Did Mr. Lynch not ask about the expense claimed to have been inflicted on Mr. Burrill and caused by Mr. Osborn's unauthorized mold change - Mr. Burrill, where is the invoice, when did you find out, did you ever get any of the product following the mold change, when did you get it as referenced in the letter from attorney Carroll, March 14, 2012 at RCTI A400-2. Did Mr. Lynch ask Mr. Burrill about the contradiction between Mrs. Osborn's letter and Mr. Carroll's statement that "...the Osborn's have apparently sent my client a check for \$1,000.00....[in]..an attempt to make reparations for the approximately \$2,000.00 expense that my client suffered as a result of the changing of the mold and the product materials..." RCTI A400-2. Did Mr. Lynch not learn that Mr. Burrill had color units in the fall of 2009 during one of the fishing trips? Did Mr. Lynch not ask why the mold change caused a \$6,300.16 TOTAL Wasted Product due to the Mold change at SBPI 4 ? Did Mr. Lynch not try the old inventory products with the new color products following the mold change? Did Mr. Lynch not ask about Mrs. Osborn's letter and the \$1,000? Did Mr. Lynch not become concerned that Mr. Burrill was not being truthful?

FALSE TESTIMONY AUTHORITY AND IT'S SUPPORT OF FAILURE TO COMPLY WITH THE DUTY OF GOOD FAITH

Mr. Burrill's testimony, as suggested in the Arbitration Demand, as found in Claimant' Response to Respondents' Discovery and in Mr. Burrill's Declarations,

addressed most if not all of the questions raised in the immediately preceding paragraph. And the answers for each is that Mr. Burrill was lying.

Many of these same issues are addressed in the Claimant's Arbitration Brief signed by Mr. Lynch on March 15, 2013. Would Mr. Lynch, had he researched the consequences of certifying an inadequate or false response or statement, have been encouraged to do something dramatic in insuring that the Arbitrator would not be bamboozled by Mr. Burrill's lies? *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 282 P.3d 1107, 168 Wn.App. 710, 718 (Wash.App. Div. 3 2012) where the court stated in part "...we simply do not understand why counsel thought he had to do so, let alone why he was justified in certifying an inadequate response." Should Mr. Lynch have made a "noisy withdrawal"? *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3rd Cir. 2007) rather than continue to sign? Should Mr. Lynch have read RPC 3.3 and called the WSBA for an ethics opinion?

There was no legal basis for asserting the Inventorship issue when such was statutorily limited for action only by the Director of the Patent Office. How would the many contradictions in Mr. Burrill's declarations, exhibits, and testimony, not be detected and acted upon by Mr. Lynch?

Mr. Lynch, in response to the Arbitrator's call for Response to the Interim Decision, gave a Declaration. He described his experience, his principal role in the law firm, in his efforts to resolve this case, and his management of costs. Mr. Lynch's Declaration is not supportive but is an indictment. With the experience indicated by Mr. Lynch, how would he continue with legal briefing which was misleading for the Arbitrator and why would he not take action in view of the multitude of contradictions and lies from his client?

The problematic legal basis for the Inventorship issue, obviously leading to expense for Respondent, and the contradictions seen in Mr. Burrill's contentions, lead to the conclusion that the Arbitrator is mandated to examine this matter for CR 11 violations.

It is ironic that the continued presentation of false testimony strengthens the evidence of a failure of the Duty of Good Faith. Mr. Burrill's testimony profoundly supports the conclusion that Mr. Burrill does not and will never conduct business under the License Agreement with Good Faith.

MORE THAN BUMBLING TESTIMONY – NOW EVIDENCE OF THEFT

This is the point of divergence from a simple evidentiary error, dispute or something to be judged by the Tribunal. This is an outright "Claim Jumper's" grab at the property. These "errors, contradictions, lies" by Mr. Burrill, seen in Declarations and testimony and as supported by Mr. Burrill's witness and as subscribed by Mr.

Lynch in his Declarations and Arbitration Demand, directs the Arbitrator's attention to the issue of whether or not a reasonable or prudent investigation was conducted at the outset and prior to the filing of the Arbitration Demand by Mr. Lynch.

This grab at the property, based on lies and misguided legal briefing, causes divergence into two matters of particular concern and interest to the legal system.

Rules in presentation of evidence strive to eliminate or reveal false testimony. Rules of Ethics, when shootings were finally deemed outside the Law of the West, impose additional burdens and safe guards on the legal profession. Rules of Contract, the Duty of Good Faith, protect contracting parties from theft.

The Duty of Good Faith is alive and well. CR 11 is a protection for justice and a Guide which requires a mandatory action by the Tribunal. This questionable presentation by Mr. Burrill's counsel creates a command, an obligation, requiring the Arbitrator to act. A failed legal basis for Inventorship and failed facts presented as lies ignites the imperative of *Washington Motorsports Ltd, supra at 718*, "¶ 25 The trial court had an obligation to impose sanctions in this case and did so after consideration of the appropriate governing principles...".

Mr. Burrill acknowledged, in the License Agreement, that the property was owned by the Osborn's. His Inventorship claim was demonstrated to be false. The First red flag was counsel's error in Law in demanding Inventorship decision making by the Arbitrator. The Second was realized with the revelation of the Osborn prototype from 2005 where Mr. Burrill's counsel would see "diver-diverter" with the "double 9 angles".

Counsel should have realized the raising of the Red Flags when they read case law regarding the Directors singular privilege relative to Inventorship. Counsel should have seen RED when he viewed the photographs of the prototypes and read Osborn's' history of the invention - the first diver in 1956, the retirement, the dream in 2003 of the 1956 diver, the purchase of equipment, the making and experimenting with dozens of divers and "diver-diverters". Another Red Flag was up when Mr. Burrill retracted from the "One who Conceived" to conceiving "double 9" angles - "Mr. Burrill, where are these two angles - you say one is the angle of the bridge?" But this Red Flag is surely understood by Mr. Lynch as Mr. Lynch drafts his declaration acknowledging Mr. Burrill's limitations.

Then the testimony regarding Mr. Burrill's rush of Mrs. Osborn's March 2012 letter to attorney Carroll. Mr. Burrill would have the Arbitrator believe that where Mrs. Osborn pleads for conversation and shows her concern over Mr. Burrill's hard times with the \$1000 gift she is actually trying to pay a debt to Mr. Burrill. Mr. Burrill would have the Arbitrator believe that Mr. Carroll, examining the letter, doesn't recognize Mrs. Osborn's \$1000 gift but addresses a \$2000 expense incurred by Mr. Burrill for mold changes to product color.

Mr. Burrill was the only source of the claim of a \$2000 unauthorized revision of the molds. Mr. Burrill says that he showed the letter to John Carroll. But Mr. Burrill did no such thing. Mr. Carroll says that "apparently" there was an expense and apparently the \$1,000 was an attempt to repay. This is Mr. Burrill's lie that now draws Mr. Carroll into the realm of falsity. The \$2000 revision was shown to be another lie - Mr. Burrill used the product from the revised molds, he was not charged, did not pay, and knew when he testified in Declaration and at the hearing this to be false. Did Mr. Lynch not know? The Osborn's paid for the mold revision.

The complained of \$2000 unauthorized mold change led to Mr. Burrill's contention that the old inventory would not fit with the new color pieces. Mr. Burrill demonstrated a cutting hazard with high theater, urging Mrs. Osborn and the Arbitrator to experience a feigned cutting hazard. Again, Mr. Burrill was play-acting.

Neither Mr. Osborn nor Mr. Williams demonstrated any problem in fitting the old first run products with the bridge from the revised mold. Mr. Burrill was again lying. Mr. Burrill added lies to the original thought of his "Inventorship". He thereby attempted added weight to damages - his words "incompatible" parts and a "cutting" hazard.

This Second Issue I've addressed related to Mr. Burrill and "Inventorship". A "Claim Jumper" attempt - an attempt to take property from the persons who had proved the claim.

The Third Issues relates to the ethics of allowing a client to lead a judge or arbitrator or any Tribunal astray. One topic might be understandable. That is, a discussion with Mr. Burrill regarding primary elements of an invention could have credence and be worthy of presentation. But then the Osborn photos showed a 2005 "diver-diverter" prototype made and tested and adjusted over a range of angles by Mr. Osborn. And then the contemporaneous Claimant's production of Mr. Burrill's September 2009 email showing that he did not understand the angular relationships. These "facts" created the basis for another investigation by claimant's counsel. Were other parts of Mr. Burrill's contentions weakening? Was there reason to doubt and to inquire? Was there ever a reasonable or prudent investigation? Was there evidence to prompt additional questions?

Mr. Lynch provides a Declaration in support of damages in this post-Interim Decision phase. He states his depth of experience, his registered Patent Attorney status, his partnership role, his attempts to reduce costs - But as a litigator bringing a case to an Arbitrator, what were the questions raised in Mr. Lynch's mind as the contentions by Mr. Burrill met evidentiary failure? Mr. Lynch states that he turned the case over to an associate as a cost control measure. Did Mr. Lynch not hear of the contradictions? Did Mr. Lynch rely on his associate to detect and question?

The Arbitrator, comprising a Tribunal, is required to give particular attention to CR 11 and RPC 3.3 hazards in conducting the Arbitration. Justice finds some hard things to look upon. But when those "hard things" arise they must be confronted. Justice is the expectation.

I started litigation in 1976 and took the Patent Bar in 1990. I have represented plaintiff and defendants in divorce, securities, injury, intellectual property and other matters for 37 years. Mr. Burrill's testimony is the most egregious example of falsification in my experience. The depth and width of the individual topics he has misrepresented by his deception is remarkable. He did not limit to one lie but proceeded to manufacture a series of falsehoods with either a property claim or a damage element attached to each. There were many legal and evidentiary conflicts to concern Mr. Burrill's counsel. The conflicts required action by Mr. Burrill's counsel. A noisy withdrawal was appropriate. *In re Teleglobe Communications Corp.*, 493 F.3rd 345, 369 (3rd Cir. 2007).

As evidence of deliberately false testimony mounted, the actions of Counsel for Mr. Burrill was the advancement of the case with execution of the Arbitration Demand, of a Response to Discovery, and of several Declarations. Each occurred following events raising alarms re: falsity. Each occurred following time for examination of the law regarding Inventorship. Several pleadings were signed by Mr. Lynch without the required prudent investigation or legal analysis. CR 11 has been violated. RPC 3.3 has been violated.

Mr. Lynch's recitation of his background is enlightening. It illuminates the extent of his engagement with the judicial process and magnifies the understanding that a person with such a legal background will be particularly sensitive to deception. That background, in light of the CR 11 mandated prudent investigation, is concerning.

Attorneys, Judges and Arbitrators, by reason of their involvement in litigation where some parties and witnesses have motivation to be creative, have specific experience in detection of falsehood. A Tribunal, which includes Arbitrators, occupies a critical position in the administration of justice. *United States v. Frega* 179 F.3d 793, footnote 12 regarding a California Criminal Statute (9th Cir 1999). The judicial officer must be alert to deception and must be prepared to effect a cure when assaulted by lies. CR 11 sanctions are appropriate in this matter.

THE DUTY OF GOOD FAITH

The Initial issue regarding falsity was Mr. Burrill's assertion of Inventorship. The Second regarded lies and ethics. The Third Issue brings into focus the state of the "Duty of Good Faith" in Washington.

Mr. Burrill started his abuse of the Osborn's telling Mr. Osborn that he owed them \$7000, that he had sent 2000 units to Germany and telling Mrs. Osborn that he

would see that they would not receive a dime from Germany. These acts prompted a March 2012 letter from Ivey to Mr. Carroll. Mr. Carroll's response, obviously orchestrated by Mr. Burrill, was a rebuff denying \$7000, 2000 units and which characterized Mrs. Osborn's \$1000 gift to Mr. Burrill as an attempt to make amends for "the unauthorized" revision of molds. Mr. Carroll refuted every concern addressed to Mr. Carroll.

The Arbitrator's holding that the Osborn's were not justified in terminating the Exclusive License Agreement does not state findings to support the holding. At the outset of this interaction between Mr. Burrill and the Osborn's, the points addressed were the "\$7000, 2000 and not a dime". These statements by Mr. Burrill indicated that he was not acting in Good Faith in reporting sales. These statements evidenced the intent to in fact allow "not a dime" to the Osborn's. Mr. Osborn had the means to act by simply having two sets of books. One set accounting for the portion of sales to be reported to the Osborn's and a second set accounting for remaining sales.

The Arbitrator is compelled to appreciate the character of Mr. Burrill as evidenced in his multitude of lies. Mr. Burrill has demonstrated his untrustworthiness. Mr. Burrill will be successful in the stealing of the Osborn Patents if the Arbitrator maintains his Interim Decision.

The Restatement Second 205 Duty of Good Faith has elements pertaining to a

person such as Mr. Burrill. "Parties to a contract have a duty to perform in good faith and to cooperate with each other so that they each obtain the full benefit of performance. *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991). The implied duty "arises only in connection with terms agreed to by the parties," and "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.* at 569. **Circumstances showing breach of the duty of good faith include, "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." Restatement (Second) of Contracts § 205(d) (1981). (Emphasis added).** This element of the Duty of Good Faith is found in an unpublished opinion *Fairhaven Land & Livestock Co., LLC v. Chuckanut Trails Water Association*, 60909-2-1, Court of Appeals of Washington, Division I (2009).

Mr. Burrill's dishonesty is extreme relative to these failures. Mr. Burrill's intent may have evolved. Perhaps initially he was just full of hot air. His "hot air" of \$7000 and not a dime" gave uncertainty to the Osborn's. But by the time of Mr. Lynch's letters to Osborn counsel, Mr. Burrill's intention had mutated. Generally mutations are deformations resulting in death or disability. Here

Mr. Burrill's intention turned him into a thief. This Arbitration has been Mr. Burrill's great effort to steal the property; to present lies to a Tribunal which, if not observant, gives credence and awards the property.

Lying, cheating, stealing - these characteristics are the very aspects the Tribunal, and Counsel, are to guard against. The Tribunal is to detect and expose. The attorney is to distance himself from such a client.

Restatement Second §205. DUTY OF GOOD FAITH AND FAIR DEALING states the following:

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

The comment to section 205 pertains to the method experienced in this Arbitration.

Comment:

- a. **Meanings of "good faith."** Good faith is defined in Uniform Commercial Code § 1-201(19) as **"honesty in fact in the conduct or transaction concerned."** "In the case of a merchant" Uniform Commercial Code §2-103(1)(b) provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

Mr. Burrill's comments to the Osborn's regarding "\$7000, 2000 units and not a dime" was the initiation of a "pattern and practice" in effecting the "Claim Jumping" theft of the inventive fruits of the Osborn's ceaseless work since 2003. The Osborn's have spent more than \$100,000 in effecting the first patent for the diver and in the continuing advancement of the "diver-diverter". Mr. Burrill acknowledged ownership of the inventions by the Osborn's. Mr. Lynch launched additional elements including Inventorship, in his letters in October 2012 and in the Arbitration Demand.

There are many facets to the attempt to gain the property via this Arbitration. Some facets mandate action by the Tribunal. Some facets reflect intent to lie and steal.

CONCLUSION

The Arbitrator is alerted to the actions required of the Arbitrator under Rule 11 and RPC 3.3. Respondents request the Arbitrator to make findings and to Finally Decide that the License Agreement is void.

SHOULD THE ARBITRATOR NOT FIND THE LICENSE AGREEMENT VOID

If the License Agreement is not void then the Osborn's request the following:

THE MOLDS

The Molds, wherever they are used, must be with an entity subject to a contractual requirement of reporting to the Osborn's' of all production and distribution of the parts comprising the product. The report is to be made quarterly and is to be made directly to the Osborn's. A contact person at the entity must be available for direct communications in the event of lack of clarity.

OFFSET BY CAPITAL EXPENSE OF PATENT PROSECUTION AND RELATED PATENT FEES

Any award to Mr. Burrill must be offset by the Capital Expense experienced by the Osborn's in development and patent prosecution of the diver and "diver-diverter". This requirement arises from the License Agreement produced by Claimant as Exhibit 1 to the Arbitration Demand where, at the first paragraph of the second page of the License Agreement, the following is stated:

"LICENSEE, in consideration of the grant of a license under U.S. Patent Application No. 11,209,391 and United States Patent Application No. 12,641,291, will pay royalties, make all necessary capital investments, and achieve PRACTICAL APPLICATION of the invention; and.....

The required payment by the LICENSEE of ..."all necessary capital investments..." imposes payment by Mr. Burrill of all patent and patent prosecution fees. Patents and Exclusive License Agreements are Capital Assets. The expense associated with the same comprises a "capital investment". *Trantina v. United States*, 512 F.3d 567, 572 (9th Cir. 2008) and stating in part: "*United States v. Dresser Indus., Inc.*, 324 F.2d 56, 60-61 (5th Cir.1963) (finding that the exclusive right to practice a patent did constitute a capital asset); *Nelson Weaver Realty Co. v. Comm'r*, 307 F.2d 897, 899-901 (5th Cir.1962) (finding sale of mortgage servicing

contract along with files, ledgers, and records to be a capital asset); *Dorman v. United States*, 296 F.2d 27, 29 (9th Cir.1961) (finding that an option to become a full partner in a business venture constituted a capital asset); ..."

PATENT INFRINGEMENT

Exhibits RCTI A380-3 show Osborn sales at \$2700.94 for 225 units at an average of \$12.03/unit. Exhibit RCTI A400-1 shows costs experienced by Osborn in purchasing product of \$6366.72 at an average cost of \$4.58/unit. Based on total costs of \$6366.72 Osborn has not realized profit and Infringement Damages are zero.

Based on 225 units total sold at \$12.03/unit with a cost of \$4.58/unit the difference is \$2700.94 less \$1030.50= \$1670.44. A reasonable royalty rate per the License Agreement is on sales of 225 units, License Agreement page 2 paragraph 2 37% for retail, 28% for wholesale, and 26% for distributors - there being only wholesale sales by Osborn the total is total sales of \$2700.94 x 28% = \$726.56.

Minimum Patent Infringement damage is \$0.0 and maximum is \$726.56. However, Claimant did not give testimony of sales lost. Hence the infringement damage should be zero.

The purpose of a damage award for patent infringement is to give the plaintiff reasonable and full compensation for the loss incurred because of the patent infringement. Calculation of lost profits is by its nature imprecise. "Lost profits cannot be computed with certainty; they are hypothetical by definition. The 'reasonable certainty' test . . . is no more than a test of probability as it must be in dealing with a hypothetical situation." *H. K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, supra. The authorities are clear that in awarding lost profits, reasonable probability rather than precision is required. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931); *Livesay Window Co. v. Livesay Industries, Inc.*, supra; *W. L. Gore & Assoc., Inc. v. Carlisle Corp.*, supra. *Milgo Electronic Corp. v. United Business Communications, Inc.*, 623 F.2d 645, 665 (10th Cir. 1980).

COPYRIGHT INFRINGEMENT

The Osborn's were by testimony unaware that there was copying of any of Claimant's materials. However, all copyright material sold were included with the units sold and accounted for in the Patent Infringement comments. Thus the full value, for which not dollar amount was presented, is included within the accounting for sale of units. Additionally, in Copyright Infringement where a single work of authorship is at issue, there is but a single claim, i.e., where there are 225 sales of the single work of authorship there is still only one copyright infringement claim.

TRADEMARK INFRINGEMENT

A flavor of the extent of damages experienced in this matter is seen in the limited time where sales were made, being in September and October 2012 and comprising sales of 225 units to 6 stores or individuals. The extent of Trademark Infringement is limited by the absence of a Nation Wide right with the Claimant having only a State Trademark Registration.

A court has commented as follows: In a trademark action, the nature of the proof required to support a jury award depends on the circumstances of the case and is "subject to the principles of equity." See *DSPT Int'l, Inc.*, 624 F.3d at 1223. The trier of fact must distinguish between proof of the fact of damages and the amount of damages because a mark holder is held to a lower standard in proving the exact amount of actual damages. See *La Quinta Corp.*, 603 F.3d at 342. In measuring harm to goodwill, a jury may consider a plaintiff's expenditures in building its reputation in order to estimate the harm to its reputation after a defendant's bad acts. See *Smith Corona Corp. v. Pelikan, Inc.*, 784 F.Supp. 452, 476 (M.D.Tenn.1992) (" [I]n order to calculate damage to a corporation's goodwill due to a competitor's false advertising, one must take into account the amount of money expended by the injured corporation in the promotion of its trademark."). Upon proving causation, the plaintiff's evidentiary burden relaxes considerably. To support a jury's actual damages award, there need only be substantial evidence to permit the jury to draw reasonable inferences and make a fair and reasonable assessment. *La Quinta Corp.*, 603 F.3d at 342 (emphasis added). *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1112,102 U.S.P.Q.2d 1046 (9th Cir. 2012).

In this matter there was no false advertising and no evidence of loss of goodwill. The sole evidence was by Mr. Morasch the manager of Distributor Gunarama. He said that he would be selling these units at the time of testimony in 2013. He has no testimony indicating any loss of interest in continued servicing of Mr. Burrill. There was no confusion suggested by his testimony as to whom Mr. Burrill was and that he provided a fishing product.

In this matter Trademark Infringement damages have not been proven. There should be no award for Trademark Infringement.

DAMAGES GENERALLY

Mr. Burrill littered the documents returned in Discovery with the email at SBPI 507 and RCTI A230-2, -3, -4&5, et al, that the selling season is over and that he would need units in March/April 2013. Mr. Burrill continued selling throughout 2012 per RCTI A240 with multiple contacts with derfischerpeter. Mr. Burrill retained hundreds of black units as listed in his spread sheet as total loss with all of these units available for sale. Any missing parts were available from PIM and, as

evidenced by Mr. Burrill's email of November 6, 2012, Mr. Burrill continued in his seeking of product from PIM.

Damages in this matter should be constrained. Mr. Burrill has inflicted damages by his own decisions.

CONCLUSION

Mr. Burrill is a liar. The License Agreement should be void. Mr. Burrill must not be allowed to gain property by such outrageous evidence and testimony. Counsel for Mr. Burrill should not have allowed such evidence and testimony.

If this matter is not resolved with voiding of the License Agreement then the Damage award should be minimal. There were limited sales over a matter of days. Any copyright material was accounted for in the sales. There was no evidence of loss of business relationships. Mr. Burrill's full time employment during 2010 and into 2012 were obvious impediments to his selling.

Counsel requests a finding that the Osborn's were the prevailing party regarding Inventorship, that the Osborn's be awarded of attorney fees as segregated between the defense of the Inventorship issue and, if the License Agreement is void an award of fees incurred by reason of the entire case.

RESPECTFULLY SUBMITTED THIS 26TH DAY OF APRIL, 2013

/FLOYD E. IVEY/

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Ex 6

EXHIBIT 6

ARBITRATION OF SBPI V. RCTI, AAA 75 133 00423 12
April 30, 2013

RESPONDENT'S RESPONSE TO CLAIMANT'S REPLY TO RESPONDENT'S MOTION FOR RECONSIDERATION AND RESPONSE TO THE INTERIM DECISION

Mr. Lynch's resentment is irrelevant.

Law and fact became the relevant factors when Mr. Lynch's signature on the Arbitration Demand certified a basis in law and fact. That November 6, 2012 Pleading commenced the process of presenting misleading briefing and false testimony to the Tribunal in violation of CR 11 and RPC 3.3.

Mr. Lynch's October 2012 letters to opposing counsel were not pleadings. Those letters functioned as negotiation devices seeking voluntary acts by the Respondents. The negotiation tactic did not persuade the Respondent to Petition the Patent Office to add Mr. Burrill as an additional inventor.

Mr. Lynch's Arbitration Demand on November 6, 2012 was the step from "negotiation letter" to "pleading". The former was not subject to CR11 or RPC 3.3. The latter was subject to both.

The Arbitration process, starting with the Demand, mandated both counsel and Arbitrator to attend to CR 11 and RPC 3.3. Cases addressing both are cited in Respondents' Motion for Reconsideration. The time for prudent and reasonable examination of Arbitration claims existed until the Arbitration Demand was signed thereby "certifying" that the Inventorship claim, and all other claims, was supported by law and fact.

Mr. Lynch, in his April 28, 2013 Response to the Motion for Reconsideration, continues to speak of Issued Patents without distinguishing the Issued Patent from the pending Patent Application. Mr. Lynch continues to advise the Arbitrator that the Arbitrator has authority that is denied to Federal Judges.

Mr. Lynch, in November 2012, in reviewing the Respondents' Response to the Arbitration Demand, realized immediately the resistance to his inclusion of the Inventorship Claim. Mr. Lynch was favored with the immediate citation to law revealing that Federal Law allowed only the Director of the Patent Office to make Inventorship decisions for pending Patent Applications. Mr. Lynch had the opportunity to research, understand his legal misperception and to Amend and withdraw the Inventorship claims.

Mr. Lynch also had the opportunity to realize that his path forward re: Inventorship was by Petition to the United States Patent and Trademark Office. Mr. Lynch did not choose that path. Rather, the path without legal foundation, strewn

with untruth, was pursued to the expense and distress of the Respondents and to the affront of justice.

However, the Arbitration path was interrupted in several instances with each providing additional opportunities to Mr. Lynch to make corrections. Respondents' Motion for Summary Judgment re: Inventorship was another obvious raising of Red Flags that again signaled a time for correction.

The refusal to make the necessary correction raises troubling CR 11 and RPC 3.3 questions. Did counsel not realize the error of his continued citation to the Arbitrator of law pertaining to "Issued Patents" and not to "Pending Patent Applications"? Did counsel intentionally continue with knowledge that the law cited was not pertinent and was misleading? Did counsel believe that the Arbitrator, possibly having little familiarity with Patent Law, would not realize the problem? Did counsel simply overlook the contradictions in Mr. Burrill's testimony? Did counsel intentionally allow the continued falsehoods in Declarations and testimony? Did counsel believe that the Arbitrator would not detect issues in law and fact? Did counsel think that the Arbitrator would be reluctant to hit CR 11 head-on? Did counsel believe that CR11 would be too thorny to be addressed by an Arbitrator just two blocks down the street?

Counsel for Respondent raises these questions at a time when the issues remain viable for and subject to examination. The examination is mandatory for the Arbitrator. The Tribunal has broad power to question and is mandated to question. The Tribunal has the duty to make findings.

This difficult time, confronting Mr. Lynch and mandating action by the Arbitrator, was created by Mr. Lynch. CR 11 and RPC 3.3 are burdens for counsel. When evidence of violation exists the Tribunal has the legal obligation to examine and make findings.

Fundamental matters of justice require this examination. Respondents' motion is not venom filled but is law and fact filled. Resentment has no role and is without consideration. It is justice, expressed by our courts, that imposes this obligation on the Arbitrator.

RESPECTFULLY SUBMITTED THIS 30TH DAY OF APRIL, 2013

/FLOYD E. IVEY/ WSBA No. 6888

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Ex 7

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EXHIBIT 7

AMERICAN ARBITRATION ASSOCIATION

SETH BURRILL PRODUCTIONS, INC., a
Washington corporation,

Claimant,

vs.

REBEL CREEK TACKLE, INC.,

Respondent.

CASE NO. 75 133 00423 12

**DECLARATION OF SETH BURRILL IN
SUPPORT OF CLAIMANT'S RESPONSE
TO RESPONDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
INVENTORSHIP**

I, Seth Burrill, declare as follows:

1. I am over 18 years of age and am competent to testify. I make this declaration based upon personal knowledge.

2. I am an officer and director of Seth Burrill Productions, Inc. ("SBPI"). I am a professional fisherman and also work as a fishing instructor, host television programs and instructional videos, and own and operate a fishing tackle retailer and distributor.

3. SBPI entered a License Agreement with Rebel Creek Tackle, Inc. on June 1, 2010 regarding the Bud's Diver device.

4. In mid-January 2009, I was a vendor at the Tri-Cities Sportsman show at the Trac Center in Pasco, WA. I attended that show with Chad Kaiser and Brandon Palaunik. I

DECLARATION OF SETH BURRILL - 1

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1 met Allen Osborn ("Allen") during this TRAC show when he came by my booth and discussed
2 how he had a fishing device that he had unsuccessfully attempted to market.

3 5. On the last day of the Sportsman's show, Allen reached into the inside breast
4 pocket of his camouflaged coat and pulled out his device, which at the time was just the diver
5 body with a release. No diverter was attached to the diver. At that time, the diverting property
6 of the diver was explained to me by how you placed the line in the release. By placing the line
7 in the horizontal release the tension from the lure would cock the diver and cause the body to
8 grab water which would make it track approximately 10 degrees off the side of the boat. Allen
9 explained how it worked and that he was surprised that no companies were interested in it.
10 Allen told the story of an investment company back in Michigan that he had approached, and
11 how they told him that he had nothing more than a glorified three-way rig. I looked at the
12 device and said if you could make it plane to the side like the SideWinder product that I sell,
13 and yet go down, you would have something new and different.
14

15 6. I also explained to Allen that other divers on the market like the dipsy diver
16 could track at 10 degrees and that if he could make the diver divert to the side at a 30-45 degree
17 angle by placing a diverter fin on it like a Luhr Jensen "Hot Shot" Side Planer has, he would
18 have something that the fishing industry has never seen.
19

20 7. At the January 2009 Sportsman's Show, Allen asked me if I would be interested
21 in helping develop the product and bring it to market. I said yes and gave Allen one of my
22 business cards and told him to contact me.
23

24 8. In February 2009, Allen and I spoke on the phone extensively regarding my idea
25 to make the device pull to the side. A true and correct copy of my phone records are attached

DECLARATION OF SETH BURRILL - 2

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1 as Exhibit 1, with the outgoing phone calls to Allen highlighted. I received many more phone
2 calls from Allen that are not listed on these records. On February 17, 2009 alone, we spoke for
3 over an hour regarding my suggested revisions to Allen's device. He told me that he wanted me
4 to come out and test the revised device, and we made plans to meet at Rock Lake in March
5 2009. I also asked my friend Nate VanValin to join us on the fishing trip.

6 9. I arrived with Nate Van Valin at Rock Lake in March 2009 to meet Allen and
7 his son, Brandon Osborn. That morning Allen was out fishing with his son Brandon in Allen's
8 boat. Brandon dropped Allen off at the shore and he boarded my boat and Brandon went back
9 out into the lake. Allen had the device prototypes he had been working on in a small cooler,
10 and we each tied one on. A true and correct photograph of the prototype that was used during
11 our test at Rock Lake is attached as Exhibit 2, which had a diverting fin attached the time of
12 testing that has since broken off.
13

14 10. During our test of the prototypes at Rock Lake, Allen talked about how well the
15 device would pull to the side just like a planer board. I explained to Allen that the planer board
16 market was far too saturated and that he needed to focus on making the device go down and out
17 rather than up and out. While we were fishing, I examined the diverter structure and presented
18 the idea of cocking the diverter fin slightly off perpendicular to create a downward pulling
19 motion rather than straight perpendicular, which caused the device to ride on the surface. I
20 suggested a 9 degree top to bottom angle; through later testing, we determined that anything
21 less than 8 degrees would cause it to ride up on the surface; anything more than 10 degrees
22 would cause it to be out of balance and spin.
23
24
25

DECLARATION OF SETH BURRILL - 3

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1 11. I also discussed changes to the prototype at Rock Lake. The prototypes at that
2 time were all done with casted hollow aluminum, which were creating drag. I advised Allen
3 that if he need a piece of 1/2" x 1/2" plate, please make a bridge instead. I told him to sharpen the front
4 leading edge to cut drag on the drag and that the plate would act like a crank bait bill to help
5 drive the diver down thus allowing less weight to achieve depth. These contributions are
6 reflected in the prototypes in Exhibit 3 that have diverters and are made of aluminum. Allen
7 gave me these prototypes, which I still have. Exhibit 3 is a true and correct photograph of
8 prototypes Allen gave me to test, and the prototypes with diverters attached were developed
9 after I met Allen in January 2009. As explained below, these prototypes demonstrate my
10 contributions to the invention - the development of the diver + diverter structure that also
11 includes my idea of angling the diverter the slightly off perpendicular and angling the tip of the
12 fin.
13

14 12. During the outing to Rock Lake, Allen and I discussed a business relationship as
15 well as production of the devices. I told Allen about Plastic Injection Molding ("PIM"), with
16 whom I had worked with since 2007. I told Allen that PIM might be a good fit for the molding
17 of the device.
18

19 13. After the trip to Rock Lake, Allen and I exchanged numerous phone calls
20 throughout 2009 regarding the diver and the adjustment to the fin. See Exhibit 1. As I had
21 suggested at Rock Lake, angles up to 9 or 10 degrees were determined to perform the best.
22 One of the many things we discussed was how when diver was released into the water, it
23 wanted to swing under the boat. To remedy this problem, I discussed with Allen about how to
24 angle out the tips of the fins. The angled tips allowed for the water to catch and swing the diver
25

DECLARATION OF SETH BURRILL - 4

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1 from the boat on a slack drop. I spoke with Allen about how to create the diver angles through
2 where the fin tip is attached to the diverter plastic.

3 14. I also suggested providing different sized diverter fins. Allen was having
4 problems with the product rolling at high speeds. My knowledge of the industry and other
5 trolling products, like the Luhr Jensen "Hot Shot" Side Planer lead me to believe that a fast
6 water (or smaller diverter) and a slow water (or bigger diverter) would solve that problem,
7 which is what it did when tested. I made the final call on the size of the fins to be produced for
8 the product.
9

10 15. After extensive phone conversations, in October 2009, I coordinated a trip with
11 Allen to test the prototype at White Bluffs on the Hanford Reach of the Columbia River. Also
12 with me and Allen was Dennis Stuhlmiller. During this trip, we filmed an episode of my
13 fishing instructional show, the Angler's Xperience, using the diver to promote the product and
14 to test the final hand-built prototype before sending off for the mold with PIM. The prototype
15 fished well and Allen and I made the final decision to send it out for PIM to mold.
16

17
18 DATED this ____ day of February, 2013, in Spokane, Washington.
19

20 **SEE ATTACHED SIGNATURE**

21 Seth Burrill
22
23
24
25

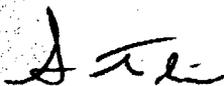
DECLARATION OF SETH BURRILL - 5

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fishing instructional show, the Angler's Xperience, using the diver to promote the product and to test the final hand-built prototype before sending off for the mold with PIM. The prototype fished well and Allen and I made the final decision to send it out for PIM to mold.

DATED this 26 day of February, 2013, in Spokane, Washington.



Seth Burrill

DECLARATION OF SETH BURRILL - 10

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Ex 8

EXHIBIT 8

1 A-10. Any assignments or other agreements from the Osborns to RCPI regarding the subject
2 matter of the '031 Patent or the '291 Application.

3 Response: Assignments have not been made from Mr. and Mrs. Osborn but will be
4 done in the near future.

5 A-11. All correspondence or other documentation regarding the presentation of the invention of
6 the '031 Patent or the '291 Application to any patent offices, including the United States,
7 the Patent Cooperation Treaty or any foreign country.

8 Response: All correspondence is available from the USPTO and at the cites
9 providing the documents identified at the response to B-6.

10 PART B 11 INTERROGATORIES

12 B-1. Where are foreign patent applications filed or foreign patents issued for the invention of
13 the '031 Patent?

14 Answer: PTI (apparently Patent Trademark Institute) started the '031 patent
15 application. The time for filing for foreign protection passed with no filing.

16 B-2. What was the contribution of Mr. Osborn to the invention of the '291 Application?

17 Answer: The entirety of the conception and reduction to practice of the structure
18 of the '291 Application is contributed by Mr. and Mrs. Osborn.

19 B-3. In which elements of which of the claims of the '291 Application, if any, is Mr.
20 Osborn's contribution shown?

21 Answer: The entirety of the claims were contributed by Mr. and Mrs. Osborn.

22 B-4. What was the contribution of Mr. Burrill to the invention of the '291 Application?

23 CLAIMANT'S FIRST DISCOVERY REQUESTS - 5

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1 **Answer: Please see the answer to B-7. The Diverter concept was conceived of and**
2 **reduced to practice in 2005 by the Osborns.**

3 **Many years and hours of Research and Development occurred before Mr. Burrill**
4 **observed any operations of the '291 structure. Mr. Burrill did not conceive or reduce to**
5 **practice any element in '291. Mr. Burrill made no contribution to the '291 Application or**
6 **the invention disclosed and claimed therein.**

7 **B-5. In which elements of which of the claims of the '291 Application, if any, is Mr. Burrill's**
8 **contribution shown?**

9 **Answer: Mr. Burrill did not contribute to any claim in the '291 application.**

10 **B-6. Where are foreign patent applications filed or foreign patents issued for the invention of**
11 **the '291 Application?**

12 **Answer: PCT/US10/60894; EP2512228**

13
14
15 **B-7. From November 30, 2005 to December 17, 2009 describe the process by which the**
16 **subject matter of '031 Patent was modified to form the subject matter of the '291**
17 **Application.**

18 **Answer: See 11ExhibitPhotographsAllPrototypes. Separately see file**
19 **Exhibit.Photos98Tol06.pdf for exhibits 98 - 163 regarding the diver and diverter research**
20 **and development and the evolution of the structure.**

21 **The Process started long before 2005: Mr. and Mrs. Osborn have fished together**
22 **since high school in about 1956-57. First Diver was made by Mr. Osborn in June 1956,**
23 **was made from heavy copper wire and was lost in Puget Sound.**

24 **They fished together with Mr. Osborn's Grandfather while they were dating. They**
25 **got married June 28, 1958.**

In about 2003 Mr. Osborn retired. In 2003 Mr. Osborn dreamed that he was
 trotting using the diver from 1956. The dream was so vivid that he saw the sun shining
 on the water and he saw the wire diver in his dream. He got up, went and bought sheet
 Aluminium, a jig saw, drill press and hand saw and started making divers that day.

CLAIMANT'S FIRST DISCOVERY REQUESTS - 6

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1 There were many diver prototypes made from 2003 through 2009. In April 2004
2 Mr. and Mrs. Osborn were talking at the breakfast table and they were getting ready to go
3 the Ringold up the Columbia River and they talked about something that would pull the
4 diver out to the side.

5 In 2005 Mr. Osborn added a "Tin", now called "diverter", to a diver (See Exhibits
6 126 et al with AI diverter).

7 The next "Tin" or "diverter" was made in 2007 (See Exhibit 131 et al with clear
8 diverter)

9 The next diverter was made in 2009 (See Exhibit 143 with black diverter)

10 The next diverter was clear made in 2009 (See Exhibit 144).

11 Exhibits 145, 146, 150 show diverter evolution with clear and black.

12 Exhibits 151, 152 are diversers in clear.

13 Exhibit 153 has diverter in black.

14 Exhibit 160 has diverter in black with bracket for adding weight to counter rolling.

15 From 2005 to a time prior to meeting Mr. Burtill, the Osborn's have spent
16 hundreds of hours testing the diver and diverter. Every angle has been tested with many
17 of the Exhibits illustrating the ability to bend the bracket connecting the diverter to the
18 diver to allow adjustment of all angular relationships between diverter and the diver.

19 The Research and Development by Mr. Osborn and the constant discussions at
20 home and during fishing by the Osborns resulted in the diver and diver with diverter
21 having been operated at every configuration which, in 2009, was observed by Mr. Burtill.
22 See Exhibits 98 through 163 evidencing the R&D and evolution of the structures of
23 '431 and the Patent Application.

24 B-7A. Specifically, please describe the Osborn's discussions with Seth Burtill, both in-
25 person and over the phone, regarding changes in the diver prior to December 17,
2009.

Answer: There were no changes discussed.

At a meeting of Mr. Osborn and Mr. Osborn's son with Mr. Burtill,
Mr. Burtill observed the diver with diverter as it was operated by Mr.
Osborn's son and as the diver with diverter passed by the boat where Mr.
Burtill was located.

Mr. Burtill saw the operation and the depth at which the diver with
diverter was located in the water. Mr. Burtill stated his preference which
was only one of the configurations already tested by the Osborn's. There was

CLAIMANT'S FIRST DISCOVERY REQUESTS - 7

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no change from the testing already done by the Osborn's as a result of discussions with Mr. Burrill.

B-8. List all parties who have sold, marketed or distributed a diver on behalf of RCTI. For each individual or entity listed, provide first and last name as well as current contact information.

Answer: Other than Mr. and Mrs. Osborn, only Mr. Osborn's son Brandon Osborn, Endicott WA.

A close friend of Mr. Burrill's, Mr. Stallmeyer, known to Mr. Osborn, purchased one diver from Brandon Osborn via the internet. He made the single sale to Mr. Stallmeyer and one other sale.

In 2009 when Mr. Osborn and Mr. Burrill were on the Columbia Reach Mr. Stallmeyer were also at the same location. At that time Mr. Osborn gave 2 of Mr. Osborn's prototypes to Mr. Stallmeyer. Mr. Stallmeyer had seen that Mr. Osborn and Mr. Burrill were catching fish and Mr. Stallmeyer wasn't having luck.

B-9A. Please list all entities, including but not limited to marketers, retailers or distributors, which RCTI has solicited to carry or stock Bud's Diver.

Answer: See invoices produced at A-1. Entities contacted but with no sales: High Desert Marine and Black Sheep were contacted but when it was revealed that Burrill had product the Respondent withdrew.

B-9B. Please list all store names, addresses, and name of individuals involved in product purchasing, for the stores that RCTI alleges have been unsuccessful in purchasing Bud's Diver from SBPL.

Answer: 1. Grigg/ACE Hardware - limited success with their contact with Burrill with dispute arising.

2. Grigg/ACE Hardware and Ranch & Home want the product year around but are unable to get product from Burrill.

These stores have requested that seminars be provided to illustrate the use of the Bud's Diver with Diverter. They have been unable to have seminars provided by Mr. Burrill.

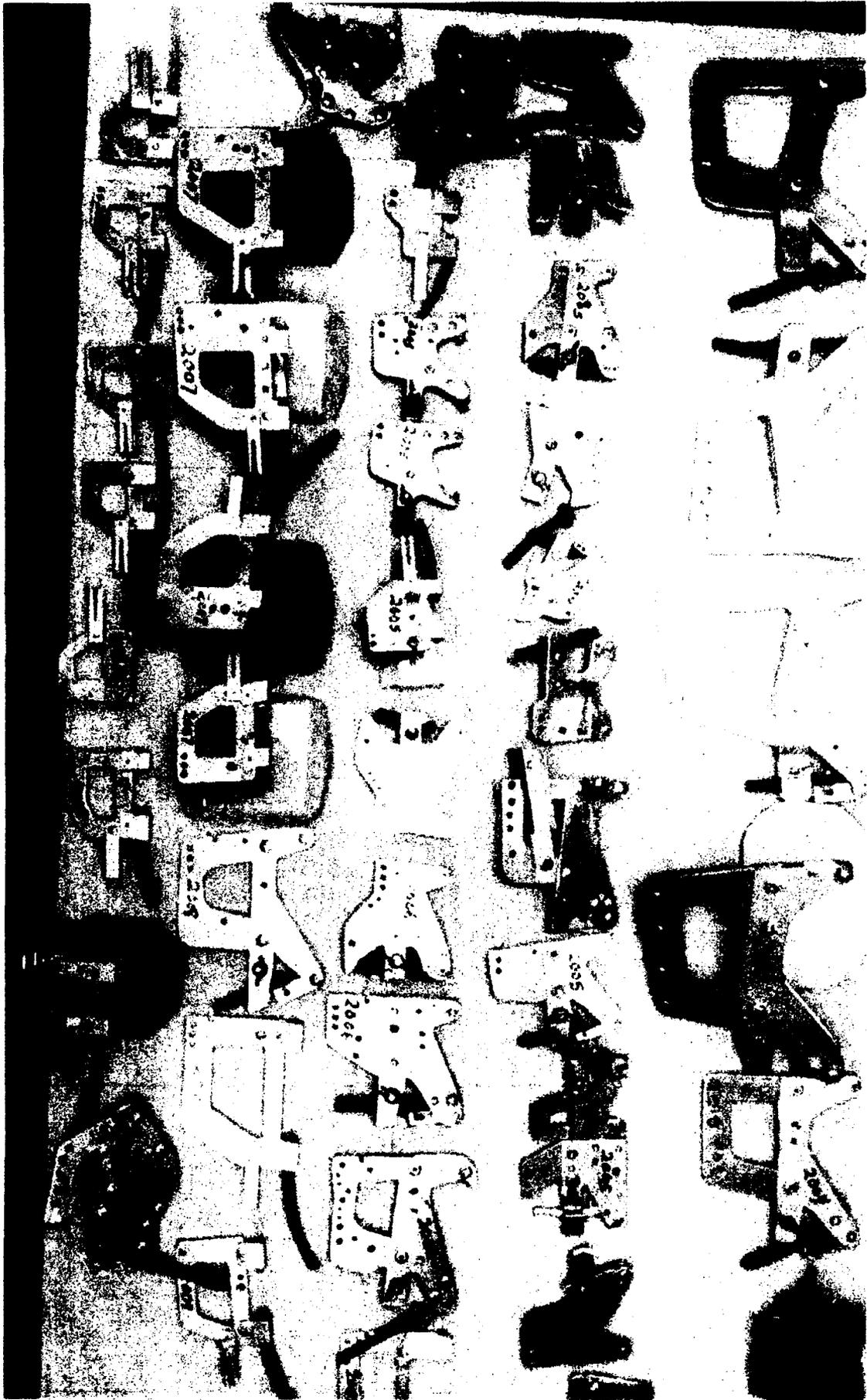
CLAIMANT'S FIRST DISCOVERY REQUESTS - 8

LEE & HAYES, PLLC
401 W. Riverside Avenue, Suite 1400
Spokane, Washington 99201
(509) 324-9226
Fax: (509) 323-8979

Ex 8

Ex 8

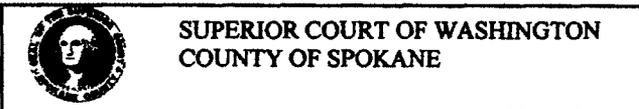




FILED

NOV 18 2013

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK



SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

*Seth Barrell Productions
Inc.*

Plaintiff,

Rebel Creek Tackle Inc

Defendant.

Cause No.: 13-2-01982-0

ORDER

Plaintiff's motion to show basis
granted - Motion to Strike denied - Defendants
Motion Re: ambiguity denied.
moves the court for:

II. FINDING

After reviewing the case record to date, and the basis for the motion, the court finds that:

III. ORDER

IT IS ORDERED that:

Motion shown granted; Motion
to strike denied; Defendants Motion
Re: ambiguity denied.

Dated: 11/15/13

HONORABLE ELLEN KALAMA CLARK
Superior Court Judge

Presented by:

Ivey for defendant
Smith for plaintiff
Attorney for the Plaintiff

Attorney for the Defendant

Blank Order

1 MR. IVEY: On the continuance Floyd Ivey
2 from Kennewick.

3 THE COURT: Okay.

4 MR. SMITH: Jeff Smith for the Plaintiff,
5 Your Honor.

6 THE COURT: Gentlemen, this is Seth
7 Burrill Productions, Inc. versus Rebel Creek
8 Tackle, case 13-2-01982-0. Originally filed as
9 the Plaintiff's motion for remedial sanctions,
10 contempt, and other relief. The Defendant has
11 asked for a continuance of this matter. Mr.
12 Ivey represents the Defendant. Mr. Smith here
13 on behalf of the Plaintiff. Mr. Ivey, let's
14 stat with your motion, please, for continuance.

15 MR. IVEY: I represented the Defendants
16 from 2007 until September 6 of this year and
17 that followed the conclusion of an arbitration
18 which concluded in about May or June of 2013.
19 Then I had a phone call from Mrs. Osborn on
20 October 24th, advising that the Plaintiff's
21 motion was set and so I knew nothing of this
22 case from September 6 until October 24th.

23 So there is an unfounded assertion that I
24 am fully aware of what was going on in those
25 months, and I wasn't.

1 I looked at the word, the critical factor
2 in this case is a word that has been inserted
3 into the case following the arbitration. The
4 arbitration concluded that Mr. Burrill would
5 have access to the molds and this involves a
6 product that was invented by Mr. Osborn and is
7 made through plastic injection molding process.
8 And so the arbitration and the license
9 agreement both determined that Mr. Burrill
10 would have use of the molds.

11 But in the order presented to the Court in
12 its motion for judgment, it inserted the word
13 transfer, that is the molds would be
14 transferred to Mr. Burrill. And the word
15 transfer is the critical factor here today.
16 This is a word that is outside of the license
17 agreement. It is something that comes about
18 through the motion by Plaintiff and the order
19 that was subsequently entered. And the word
20 transfer then is not defined and until it is
21 defined we would not know what the nature is of
22 that transfer.

23 In this case, this involves a property
24 that is owned by Mr. Osborn and it has been my
25 expectation following my departure from the

1 representation that this would move on to a
2 process of execution of the judgment and
3 resulted in a satisfaction of judgment and
4 that's not what's happened here. Instead,
5 we're at this point of asking for transfer.

6 And I look at the word transfer by
7 considering Mr. Smith's declaration that
8 supports his motion for sanctions. At
9 paragraph five, he says: My office eventually
10 reached an agreement with PIM, that is the name
11 of the company that was doing the molding in
12 the Tri-Cities, reached an agreement with them
13 whereby Seth Burrill would obtain the device,
14 devices made by that company in exchange for an
15 agreed upon sum. And then in that same
16 sentence SBPI also requested transfer of the
17 molds to SBPI. Then in paragraph five of
18 Mr. -- at page three of Mr. Smith's response to
19 this motion to continue. So now we're into
20 another document at line 14 through 17 states
21 that: The Plaintiff simply desires transfer of
22 the plastic injection molds so that it may use
23 a company in which it has confidence to produce
24 its products without interference from the
25 Defendant. And that last sentence should read:

1 To produce its products without reporting all
2 sales and paying all royalties to the
3 Defendant.

4 The credibility of Mr. Burrill was
5 demonstrated in the arbitration of this matter.
6 And the full documentation of that finding of
7 credibility and the grounds by which it was
8 found is not here before the Court today, only
9 my personal declaration that it exists within
10 the documents and there were many declarations
11 and memoranda submitted in that arbitration in
12 which Mr. Burrill, after he met Mr. Osborn,
13 claimed that he was the sole inventor of the
14 product, the sole inventor of the product.

15 THE COURT: Counsel, hasn't all that been
16 determined in the arbitration?

17 MR. IVEY: It has, indeed. The
18 credibility of Mr. Burrill has been determined
19 in the arbitration, yes, Your Honor. That has
20 been determined. And it was found that he was
21 without any inventor ship attributes
22 whatsoever, and he was a liar in that effect.

23 And that's why we deal with the word
24 transfer here is to say: What is the nature of
25 the transfer 'cause that word sounds in

1 conveyance. It sounds as if something is being
2 conveyed to Mr. Burrill. But there has to be
3 definition of the word transfer to determine
4 what the conditions will be upon -- upon his
5 taking from the present location the molds that
6 are used to make this product.

7 THE COURT: And why do you need a
8 continuance?

9 MR. IVEY: Well, because in order to -- in
10 order to make a record in this matter, the
11 excerpts from the declarations and the
12 memoranda from the arbitration need to be
13 inserted into this record in order to prepare
14 it should there be any need for appeal in this
15 case, and that -- that burden was too much to
16 meet during the time period from October 24th
17 through this date.

18 Now I think that that a suggestion that
19 there is no pressure at this time for the
20 Defendant, for the Plaintiff, is found in the
21 late submitted declaration by Mr. Burrill as of
22 yesterday afternoon somewhere after 5:00
23 o'clock, and I received it only by e-mail in
24 which he says that his production season is
25 over and he will not continue now until the

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spring.

So Mr. Burrill is not at this time in the mode of being pressed to produce the product in order to meet his sales' demands.

That is the understanding of his declaration as of last night. He has at this time at least probably seven to 8000 of these products in his inventory. There were at least 5,990 of those products in his inventory at the time of the arbitration which concluded in about June of 2013.

And since that time, in accordance with the disclosures by mister -- by the owner of PIM and his attorney, Mr. Burrill has obtained other inventory from that company. So he has inventory on hand at this time of several thousand units and his declaration states that there is no -- that his production season is over at this time.

And that declaration by Mr. Burrill is pregnant with meaning for the purpose of defining the word transfer. This is a contract construction problem that is going to require evidence extrinsic to the agreement and to the Court's order to define transfer.

1 And it is the Defendant's contention that
2 the word transfer must place, if indeed these
3 molds, that's about 2000 pounds of steel, those
4 molds are merely devices that can be replaced
5 for about \$20,000. But it is what comes out of
6 those devices that makes the value in this
7 contract in this product.

8 The --

9 THE COURT: How long a continuance are you
10 asking for, Sir?

11 MR. IVEY: Well, I would say until
12 December 20, that is what I indicated in
13 agreement and I know that the same contention
14 was raised the same issues were raised in this
15 arbitration which commenced about October of
16 2012. We wanted to try to get it done with but
17 prior to April of 2013 in order to not be
18 impeded in the production of devices,
19 regardless of what the results of the
20 arbitration was. So it is my understanding
21 from that time and I once again indicate to the
22 Court that this is not before the Court, but it
23 is only in my declaration of what indeed did
24 happen in the evidence and the declarations and
25 memorandums submitted at that time that that's

1 when the production would be required to
2 commence again.

3 So I'm asking for that brief continuance
4 in order to complete the record in this matter
5 so that the term transfer can be considered by
6 the Court, fully considered by the Court, and
7 so a record that is more fully developed will
8 be available should there be a need for an
9 appeal of this case.

10 THE COURT: Thank you.

11 Mr. Smith, your response to the
12 request for the continuance, please.

13 MR. SMITH: Well, Your Honor, I will try
14 to stick to just the continuance issue. As I
15 mentioned earlier, I am Jeff Smith, attorney
16 for Seth Burrill Productions, the Plaintiff in
17 this matter. Plaintiff opposes Defendant's
18 motion for continuance on the hearing set today
19 on Plaintiff's motion for contempt.

20 We've timely filed this response in
21 opposition to the Defendant's motion for
22 continuance this past Wednesday, October 30th.
23 Our arguments are detailed in our response and
24 for the sake of brevity, I'll only reiterate
25 the key salient points from that response.

The Court's comments at the November 15, 2013 hearing are set out in their entirety in the Appendix commencing at RP 16/line 2. Counsel Ivey's Argument is found in the Appendix RP 22/lin2 21 to RP 23.commencing at , Judge Clark speaking:

2 Counsel, let me kind of focus some things
3 here this morning. **I spent a lot of time**
4 looking over the file and the documents that
5 have been submitted. (Emphasis added) I'm going to make a
6 number of findings based upon those pleadings
7 and try and tell you where I need to be with
8 regards to the argument this morning.
9 So findings I would make are as follows:
10 First, I am going to grant the Plaintiff's
11 motion to shorten time to hear the Plaintiff's
12 motion to strike the Defendant's memorandum and
13 other pleadings. So motion to shorten time is
14 granted.
15 Second, I'm going to deny the Plaintiff's
16 motion to strike the memorandum and other
17 pleadings.
18 Third, I do find that a large portion of
19 the Defendant's materials and argument are
20 irrelevant to the issue at hand and I will not
21 be considering those materials or arguments
22 that are not relevant to the issue before us.
23 The issue before us is that there is a
24 valid judgment. The question is whether the
25 order has been violated, (Emphasis added) has there been a
November 15, 2013 (Emphasis added)
17
1 contempt and should there be sanctions? I'm
2 not going to consider anything beyond that. I
3 am not going to look back at the actions prior
4 to the judgment or anybody's credibility or
5 intentions. We are just looking at the order
6 and has there been compliance.
7 Fourth, the term, quote, transfer and or
8 delivery, close quote, as used by the
9 arbitrator and repeated in the judgment is not
10 ambiguous. Its plain, simple, common sense
11 meaning is that the property is to be placed in
12 the possession of the Plaintiff.
13 Fifth, the property has not been placed in
14 the possession of the Plaintiff. The order has
15 not been followed.

16 The only issue for me today, gentlemen, is
17 whether the failure of the Defendant to act is
18 willful and intentional. If it is, then
19 contempt will be found and sanctions will be
20 ordered. That is the only issue that needs to
21 be argued today, willful and intentional
22 violations.

23 You each have ten minutes to make your
24 argument. If you want to fight with me about
25 the findings I've already made, it is your
November 15, 2013

18

1 time, but I'm telling you those are the issues
2 that I am looking for.

Following Respondent's argument for Contempt the Court
invited Ivey's argument, RP 22/line 21 through RP 32/line 21
excerpts as follows:

THE COURT: Mr. Ivey? Start at RP 22
22 MR. IVEY: Your Honor, the matter of the
23 molds, that's a property item that is owned by
24 Rebel Tackle, Inc. Once it is removed, once it
25 is delivered to someone else without the full

RP 23

1 circumstances that surrounded the molds to this
2 date, there will be a great diminution in that
3 property to Rebel Creek Tackle, Inc.
4 It would be highly unlikely that anyone
5 will come in as an investor to assist Rebel
6 Creek Tackle, Inc. in any way. At that time,
7 when the molds are gone and there is no further
8 communication with the company that holds the
9 molds regarding the production, there will be
10 no evidence that the Rebel Creek Tackle, Inc.
11 can use to rely upon to determine the amount of
12 production and know what the quality is of the
13 reports that are made by Seth Burrill
14 Productions Inc. regarding sales.
15 This all comes from this Scott Galvanizing
16 case that is recited to the Court, and that
17 concerns the definition of terms within
18 contracts, and it sets forth essentially three

19 different points, that if a term is not
20 defined, then all the circumstances surrounding
21 the formation of the contract must be
22 considered. The subsequent acts and conduct of
23 the parties to the contract must be considered.
24 The subsequent acts, that is the acts all the
25 way through today. (Reading) And the
November 15, 2013

RP 24

1 reasonableness of the respective
2 interpretations are to be considered. That is
3 a 1993 case and so here in this instance then
4 the Plaintiff admits that this is not a sale,
5 and yet the term transfer is used synonymous
6 with sale throughout the many cases that are
7 recited to this Court.
8 The definition that the Plaintiff suggests
9 but does not flesh out is that transfer and
10 delivery means to give the molds to the
11 Plaintiff, but there is no reference to any
12 circumstances, subsequent acts, or
13 reasonableness found in that conclusion.
14 Counsel does, the Plaintiff, does refer to
15 collusion; avoiding collusion between the
16 Plastic Injectable Molding company and Rebel
17 Creek Tackle, Inc. But collusion is clearly
18 some act of deceit and nothing has been
19 represented within this case to suggest that.
20 There is no -- nothing by the arbitrator that
21 would regard collusion. There is nothing here,
22 no source whatsoever to support that. There is
23 no evidence here that this -- that Seth Burrill
24 Productions, Inc. has not had access for
25 production of these molds through the present
November 15, 2013

RP 25

1 location at PIM.
2 The documents cited in Plaintiff's and
3 Defendant's memoranda that directs to the
4 definition of transfer and or delivery are
5 documents that show both the circumstances
6 surrounding the formation of the contract back
7 in 2010 and subsequent acts and conduct of the
8 parties to the contract and also reasonableness
9 of the respective interpretations.
10 Some of the materials within those
11 exhibits provided to the Court come straight

12 from documents executed by either the principle
13 of Seth Burrill Productions, Inc. or his
14 counsel during the arbitration. And they
15 indicate, and they don't indicate, they prove
16 to the Court that there was a suggestion that
17 Mr. Burrill might be a mentor or co-inventor.
18 And Mr. Burrill picked that up and took it
19 through several different phases, including
20 that of suggesting as indicating in his own
21 response that he was the inventor, of not
22 having any response then to the demonstrated
23 evidence of this product development commencing
24 in 2005. That would be four years before the
25 meeting between Mr. Osborn and Mr. Burrill.
November 15, 2013

RP 26

1 So the documents that the Court has deemed
2 not relevant here apply directly to the second
3 provision of Scott Galvanizing that the
4 subsequent acts and conduct of the parties are
5 to be considered. And we've seen now in the
6 arbitration the evidence that Mr. Burrill has
7 lied to the Court, to the tribunal in the
8 arbitration, regarding his role as an inventor.
9 And we see that the reference to collusion
10 suggests that there is some deceitful
11 relationship between that plastic injection
12 molding company and Rebel Creek Tackle, Inc.
13 That would then support the removal of those
14 molds, those 2000 pounds, 2000 pounds of steel,
15 remove it from PIM with no definition as to the
16 rights of the owner, and that would be Rebel
17 Creek.

18 So what the Defendant proposes is that if
19 these are to be removed from PIM and Mr.
20 Williams, then there should be circumstances
21 that would meet the criteria set forth in Scott
22 Galvanizing that would retain within Rebel
23 Creek the ability to ascertain the amount of
24 manufacturing that comes out of those molds,
25 when it happens, how many of each of the parts,
November 15, 2013

RP 27

1 there are three different parts to this
2 device -- where they are delivered to, the
3 dates.
4 Those -- the type of circumstances that

5 surround the formation and that would be from
6 2009, when the molds are delivered to -- first
7 are delivered from China to the United States
8 and to PIM; those circumstances through today,
9 and that's the communication directly with Mr.
10 Osborn relative to adjustments and then all of
11 the manufacturing information. That is the one
12 circumstance that would be required.
13 The subsequent acts and conducts of the
14 parties are found in the representations by Mr.
15 Burrill that he was the inventor and in patent
16 law, an inventor has the right to separately
17 and independently conduct the entire use of the
18 molds of the product without any attribution of
19 royalties of any kind to the -- to the -- to
20 the co -- to other inventors.
21 So there is an element of patent law
22 involved in this that is not clearly
23 demonstrated to this Court but it is a fact
24 that there is that right that would come to
25 exist if he was a co-inventor or an inventor,
November 15, 2013

RP 28

1 an inventor or co-inventor, and so striving for
2 that position in this case in light of the
3 evidence shows that he is a liar in this
4 matter.

5 And we have then the problem of -- of
6 delivery of these devices to someone without
7 any surrounding limitations that would
8 eliminate anyone who knows about Mr. Burrill
9 and this circumstance and that is known to the
10 industry. They will not come forth to be
11 participants with Rebel Creek and that value of
12 that property will be lost.

13 With due respect, Your Honor, I think that
14 it is error to not have considered -- to not
15 consider the documents filed, exhibits filed,
16 by Defendant in this case. I think it is an
17 abuse of discretion. I propose to the Court
18 that the Court's definition of transfer and
19 delivery is also done without an understanding,
20 without consideration of the circumstances
21 surrounding all of the factors in Scott
22 Galvanizing. The circumstances from 2009 to
23 the present, the subsequent acts of Mr. Burrill
24 and his conduct, and then the reasonableness of

25 this in destroying the commercial value, the
November 15, 2013

RP 29

1 value to Rebel Creek of this property.
2 The entire effort here, and I am have not
3 been a part of this case from September 6 until
4 October 24 but the entire effort that has been
5 undertaken since that date has been to protect
6 the property value that is represented in these
7 molds. And so from that view that is
8 absolutely a justification to resist the action
9 of removing these molds from the present
10 location without limitations. If the model are
11 to be removed from the present manufacturer in
12 order to preserve the property value, they must
13 be removed with directions that will -- that
14 will bind a subsequent plastic injection
15 manufacturing company, will bind them, to have
16 the types of communications that are necessary
17 in order to allow the property value of these
18 molds to continues.
19 I think that -- that terms like that can
20 be set forth and I am confident that a list of
21 terms that I would provide to Mr. Smith will be
22 met with a list of terms provided as counter
23 terms and that we will not come to an agreement
24 probably, we might, and if we did, we could
25 present an agreed order and if we didn't, then
November 15, 2013

RP 30

1 I think it would be appropriate for this Court
2 to hear and make a ruling.
3 But without the surrounding circumstances,
4 based on the rule of the law found in Scott
5 Galvanizing, without those limiting terms, then
6 we're gonna see that this property is lost.
7 And then so I think a matter of simply defining
8 transfer and delivery with the word transfer
9 absolutely correlated with and synonymous with
10 sale in this state, you combine that with the
11 word delivery and you have an even greater
12 distance from ownership, a greater distance
13 separating the ownership properties -- the
14 ownership elements and attributes from the
15 Osborns and from Rebel Creek.
16 So I do believe that there has to be some
17 limiting factors that are put into place that

18 will protect the property value and that effort
19 to bring that kind of -- those kind of
20 limitations to bear in the matter of
21 transferring to a different company, those
22 support, the -- the problem in getting a
23 removal of these items from the present
24 location.

25 I'm just thinking how it would go. I have
November 15, 2013

RP 31

1 had clients with their products, their molds,
2 in China during the earthquakes when the
3 earthquake finished there was no molds left.
4 I'm wondering what happens here with regards to
5 insurance. What is the nature of the company
6 that would be proposed by Mr. Burrill?
7 What would be the circumstance if the
8 payments were not made? And that's been a
9 history, it is not in the record with this
10 Court, but that has been a history between Mr.
11 Burrill and the present holder of the molds.
12 Would there be a lien? Will that lien be
13 enforced in some way? Would there be a sale of
14 those molds without any opportunity by Rebel
15 Creek to come in to protect that property
16 interest?

17 So really without the circumstances here
18 that give the property owner rights of
19 understanding of what's happening, we're gonna
20 have a -- we're gonna have property destroyed.
21 And I do believe that this would then
22 be -- that the Court in this instance will have
23 defined transfer and delivery to mean Seth
24 Burrill Productions, Inc. drives a truck up to
25 the front door of PIM, 2000 pounds of steel is
November 15, 2013

RP 32

1 loaded in and that truck is driven off to a
2 place that is unknown to Rebel Creek. It is
3 unknown unless we have a court order here that
4 will bind that third party, that injection
5 molding company, to make these communications
6 with the owner.

7 So my thought about this definition of
8 transfer and delivery, that it ignores the
9 requirements of Scott Galvanizing and with due
10 respect I think it is error and abuse of

11 discretion. But I do assert that this is the
12 reason, the rationale, for having not simply
13 said: Bring your truck down, pick these things
14 up. It is a matter of protecting property, it
15 is not -- it is not contemptuous of the Court's
16 order. It is a willful act on the part of the
17 owners but it is not a act of contempt. It is
18 an act to obtain the kind of definition that is
19 a required to assure that the property value is
20 not lost.
21 Thank you, Your Honor.

INTRODUCTION

The principal issue of this Appeal is whether or not a word or phrase in the Spokane County Superior Court Judgment of November 15, 2013 is ambiguous thereby requiring interpretation. A word and a phrase in the Judgment of November 15, 2014 revised a License Agreement provision addressing the Licensee’s rights to the “use” of injection molds. The Superior Court Judgment incorporates the phrase “...transfer and/or deliver...” into the “use” provision of the License Agreement. Neither the “use”, from the License Agreement, nor the “...transfer and/or deliver...” phrase from the Court Judgment is defined. (RP 4/line 1-5/line 4; continuing at 6/line 23-7/line 6). That is, there is no definition of either the “use” allowed by the License Agreement. There is no definition of the “use” modified by “...transfer and/or deliver...” found in the Superior Court Judgment.

The word “transfer” in Washington State is synonymous with “sale”.

The central question raised is whether the “use” and/or the added phrase “...transfer and/or deliver...” is ambiguous or otherwise undefined necessitating interpretation. The touchstone of interpretation of contracts is the intent of the parties. In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language

of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 80 P.2d 222 (1990); *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, J 20 W n .2d 573, 580, 844 P.2d 42Ji (1993).

All "...the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations..." are found in the Record on Appeal. All "...the circumstances..." are derived from the Plaintiff-Licensee's Declarations and the Plaintiff-Licensee's attorney's Memoranda, Responses to Interrogatories and Declarations arising from an Arbitration Decision of May 2013. The circumstances were presented to the Court below in Oral Argument and Memoranda.

A License Agreement dispute was arbitrated between the parties. The "use" allowed to the Licensee-Plaintiff of plastic injection molds, addressed in the License Agreement, the Arbitration Decision, the Superior Court Judgment and the Order on Plaintiff's Motion for Contempt and other Sanctions, is undefined by the words and phrases themselves.

The focus of this appeal is to determine if the License Agreement “use” of injection molds, modified by “...transfer and/or deliver...” is defined or is ambiguous. If ambiguous then definition is required. *Vacova Co. v. Farrell*, 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) CP 152-53. There was no definition of “use” in the License Agreement, Arbitration Decision or by the Judge in the Court Order appealed from of November 15, 2013. Additional words/phrase were added in the Arbitration Decision and included in the Court’s Order including “...in the transfer and/or delivery of said molds...” to the Respondent(CP 21, para 4). The issue of the lack of definition of the indicated words/phrases was addressed in Appellant/Defendant’s November 1, 2013 motion to continue CP 146, 149-50, 152/line 25; RP 4/line 1-5/line 4. The issue was before the Superior Court again on November 15, 2013. Appellant addressed the issue in accordance with the directions provided *Vacova Co. v. Farrell*, 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) holding in part "Furthermore, even if the patent ambiguities of the contract had not been reconciled by means of the rules of contract construction, the result would have been an ambiguous contract and "[i]t is axiomatic that extrinsic evidence ... is admissible to clarify such matters " CP 152/24-153/5. Extrinsic evidence of factors from *Vacova*, supra,was submitted only by Appellant-

Defendant. The Respondent-Plaintiff did not address these factors in briefing or argument. The Court did not analyze the matter of contract construction, ambiguity or need for definition.

The second principal issue is the defense allowed by definition of contract terms in Appellant/Defendant's resistance to Respondent's Motion for Contempt and terms.

Appellant seeks reversal of each of the rulings from November 15, 2013, the return of the molds to Appellant/Defendant or its designee with Respondent allowed "use" as defined in this Appeal under rules of contract construction and attorney fees based on "bad faith" of the Respondent-Plaintiff.

ASSIGNMENT OF ERRORS

Assignment of Error 1. Did the Court err in failing to consider whether "transfer" is synonymous with "sale" or "convey" in Washington State and apply contract construction factors to determine "under all the circumstances" the definition of "transfer" relative to the Plaintiff's allowed use of the injections molds?

Assignment of Error 2. Did the Court err in holding Defendant in Contempt and in not finding Defendant's resistance to the Judgment the

act of protecting property and a defense to Plaintiff's Motion for Contempt and terms?

Assignment of Error 3. Did the Court make a Finding of Fact or state a Conclusion of Law by the Court's statement at RP 17/lines 7-12 and, if so, Did the Court err in not undertaking the analysis of determining the meaning of "transfer" as equivalent to "sale" in this State followed by the consideration of all the circumstances surrounding the permitted "use" of the injection molds?

STATEMENT OF THE CASE

Seth Burrill Production Inc is the Plaintiff-Respondent and is referred to as Plaintiff. Rebel Creek Tackle Inc is the Defendant-Appellant and is referred to as the Defendant. Seth Burrill and Allen Osborn are referenced in the Clerk's Papers in Declarations submitted in the Trial Court and at Arbitration. Seth Burrill is the owner of Seth Burrill Production Inc. Allen Osborn is a co-owner of Rebel Creek Tackle Inc.

Plaintiff was licensed by Defendant to sell Defendant's Patented and Patent Pending fishing devices CP 12-17. The fishing devices are made with plastic injection molds. Plaintiff's use of the Defendant's injection molds is stated in the License Agreement, CP 14 paragraph 5, as follows:

5. LICENSOR has paid for the manufacture of the initial prototype units and the injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT.

The relationship of Plaintiff and Defendant was arbitrated with an Arbitration Decision issued on May 2, 2013 CP 36-40. The decision provided in part that:

4. Claimant shall have full, unrestricted use of the injection molds during the term of the Contract, and Respondent shall cooperate in the transfer and/or delivery of said molds as requested by Claimant; CP 39;

The Arbitration Decision contained a phrase not existing in paragraph 4 of the License Agreement as follows:

“and Respondent shall cooperate in the transfer and/or delivery of said molds as requested by Claimant; CP 39

Plaintiff moved to take possession of the molds by its Motion for Contempt and Sanctions in PLAINTIFF'S MOTION FOR REMEDIAL SANCTIONS (CONTEMPT) AND OTHER RELIEF (CP 109) set for hearing November 1, 2014 (CP 115). Defendant's Motion for Continuance and Partial Response to Plaintiff's Motion for Contempt (CP 145) was heard on November 1, 2013 RP 10/lines 3-9. The continuance

was granted to November 15, 2013 (RP 14/lines 9-10). Defendant's goal was to have the phrase including the word "Transfer" defined, to show that resistance to the Court Order was reasonable and to have the injection molds retained in control of Defendant with Plaintiff having unrestricted use. Defendant's goal was introduced in Court on November 1, 2013 as follows:

[Attorney Ivey -I]n the order presented to the Court in its [Plaintiff's] motion for judgment, it inserted the word transfer, that is the molds would be transferred to Mr. Burrill (Plaintiff). And the word transfer is the critical factor here today. This is a word that is outside of the license agreement. It is something that comes about through the motion by Plaintiff and the order that was subsequently entered. And the word transfer then is not defined and until it is defined we would not know what the nature is of that transfer. RP 5/lines 11-22.

So I'm [attorney Ivey] asking for that brief continuance in order to complete the record in

this matter so that the term transfer can be considered by the Court, fully considered by the Court, and so a record that is more fully developed will be available should there be a need for an appeal of this case. RP 10/lines 3-9.

The Court responded as follows:

I [the Court] want to be clear with Mr. Ivey ...if you wants to give some briefing or memorandum on what transfer means then that is certainly up to you and I will give you that opportunity. RP 13/line 16-14/line 2

Defendant accepted the Court's invitation and did "...give some briefing or memorandum on what transfer means..." by Memorandum and Argument on November 15, 2013. The word "Transfer", in Washington State case law, is synonymous with "sale". CP 158

If "transfer" is synonymous with sale in this state then does the word "transfer" in the Judgment appealed from, CP 271, mean that the molds were "sold" to the Plaintiff? Is the word "transfer", in this case, defined as "sold"?

If not then what does the word "transfer" mean in the Court's

Order (CP 271)?

Plaintiff drafted and submitted the Proposed Order (CP 271) without definition of “Transfer”.

But Plaintiff took a step toward limiting the word “transfer”. Plaintiff admitted that there was no “sale” of the molds to Plaintiff and that ownership remains with the Defendant. This admission is found in PLAINTIFF'S REPLY TO DEFENDANT'S MEMORANDUM, AND ARGUMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR CONTEMPT, CP 242/lines 13-17; RP 18/line 21-24.

The admission that “Transfer” is not a “Sale” and that ownership remains in the Defendant leaves the definition of “transfer” to be decided. The opportunity, need and law to define TRANSFER remained before the Court on November 15, 2013.

Our Courts have not failed to address contract construction where ambiguity or lack of definition exists. The Defendant’s briefing and argument, on November 15, 2013, specifically focused on pertinent cases regarding ambiguity with pointed argument. The Court, without elaboration regarding ambiguity, contract construction or any of the “circumstances surrounding the License Agreement”, limited its comments regarding the definition of “Transfer” by the Court’s conclusion stated at the outset of the November 15, 2013 hearing as follows:

[The Court states]...Fourth, the term, quote, transfer and or delivery, close quote, as used by the arbitrator and repeated in the judgment is

not ambiguous. Its plain, simple, common sense meaning is that the property is to be placed in the possession of the Plaintiff. RP 17/lines 7-12.

The Defendant's Memorandum (CP 158) addresses the issue of definition of the phrase "...transfer and/or delivery..." by considering all of the circumstances surrounding the use of the molds. Plaintiff did not address the factors to be considered in defining ambiguous contract terms.

The Defendant had resisted compliance with an Order to Transfer. Ambiguous terms are generally not recognized or realized until a demand is made. Here Plaintiff demanded that the molds be removed from the control of the Defendant and placed under the control and in the possession of the Plaintiff. Plaintiff's contended control is the control created by a "sale" or by "ownership". The Defendant contends that its resistance to yielding the molds to such control was not an act of contempt. Defendant's resistance was an act to protect its property.

Plaintiff contends and the Judgment concludes that Defendant was willful and without objection in compliance with the Order. Understanding "Transfer" with the guidance of our Courts will demonstrate that the resistance was a reasonable act in protection of the property residing in the molds.

ARGUMENT

I. Standard of Review for Contract Construction

Questions of law, including the interpretation of contract provisions, are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We apply fundamental contract construction rules when interpreting a contract and to the extent we interpret contract provisions; we apply the de novo standard of review. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010).

Argument – Contract Construction

A. INVITATION: As invited by the Court in this matter, (RP 13/line 16-14/line 2), Defendant did address the Court, orally and in Memoranda, on November 1 and 15, 2013 regarding contract construction.

Contract construction is reviewed de novo.

In this case contract construction addresses not only the extent of

or limitations on the rights of the Plaintiff to the use of injection molds but also supports the Defendant's position opposing contempt. Defendant's opposition to the delivery of the molds to Plaintiff comprised its efforts to protect Defendant's property in the molds. The construction will determine the authorized use of the injection molds by the Plaintiff Licensee.

The patented fishing devices are made by plastic injection molding. The License Agreement (CP 14 paragraph 5) limits the Plaintiffs right to use of the molds with the phrase "...LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT...". The extent or nature of this "use" is not defined in the License Agreement or as revised via the Court's Order to include "...in the transfer and/or delivery of said molds... to the Plaintiff" (CP 21, para 4). That is, "use" is not defined in either the License Agreement (CP 14 para 5) or in the Court's Order (CP 21, para 4).

Defendant contends that the Plaintiff's "use" revised by the "...transfer and/or deliver..." phrase is ambiguous for two reasons: First, the word "transfer" is synonymous with "sale". The Plaintiff agrees that there was no sale; and second, if not "sale" then "what" is the "use" and the meaning of "transfer"? The "what" leads to the analysis of the circumstances surrounding the relationship and the License Agreement.

State Farm General Ins. Co. v. Emerson, 687 P.2d 1139, 102 Wn.2d 477, 484 (Wash. 1984); citing *Morgan v. Prudential Ins. Co.*, 86 Wash.2d 432, 434-435, 545 P.2d 1193 (1976).

The construction or definition of the License Agreement “use” and the “use” as revised in the Court Order by the addition of the phrase “...transfer and/or deliver...” is required by *Vacova Co. v. Farrell*, 814 P.2d 255, 62 Wn. App. 386,399 (Wash.App. Div. 1 1991) CP 152-53.

The issue of the lack of definition of the indicated words/phrases was addressed in Defendant’s November 1, 2013 motion to continue (CP 146, 149-50, 152/line 25) and again on November 15, 2013. Defendant addressed the issue in accordance with the directions from *Vacova Co.*, *supra* 399 holding in part:

"Furthermore, even if the patent ambiguities of the contract had not been reconciled by means of the rules of contract construction, the result would have been an ambiguous contract and "[i]t is axiomatic that extrinsic evidence ... is admissible to clarify such matters " CP 152/24-153/5.

Extrinsic evidence of factors from *Vacova*, *supra* have been submitted only by Defendant. The Plaintiff has not presented argument regarding contract construction or ambiguities. The Court did not address these factors orally from the bench or in the Order appealed from. (CP 271).

B. ARGUMENT RE: AMBITUITY OF “TRANSFER” What are the arguments supporting the contention that the phrase “...transfer and/or delivery...” is ambiguous requiring interpretation? The law was submitted to the Court at CP 159-60.

The word "transfer" is consistently synonymous with the words "sale" and "convey" in Washington State law. Plaintiff's right is only related to "USE" of the Molds. With "sale" and "transfer" synonymous in this state, the insertion of the word "transfer" comprises an ambiguity.

The law equating “sale” or “convey” to “transfer” follows commencing at CP 161:

1. "The issue posed is whether the interpretation of the statutory language "sells or otherwise conveys, directly or indirectly" includes a *transfer* to a secured creditor of inventory in which the creditor holds a security interest." . *Martin v. Meier*, 111 Wash.2d 471,479, 760 P.2d 925 (1988)

2. The word "sale" is considered in *Palmer v. Department of Revenue*, 917 P.2d 1120, 82 Wn.App. 367, 372-75 (Wash.App. Div. 2 1996) as follows:

a. At 82 Wn.App.373 - "Sale is defined in RCW 82.04.040, in part, as follows: "Sale" means any *transfer* of

the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.40.050."

...

This definition incorporates the plain and ordinary meaning of "sell," which is a transfer or exchange of property, goods, or services to another for money or its equivalent. See Webster's New World Dictionary (3d. ed.1989)

In Black's Law Dictionary 333 (6th ed.1990) the word "convey" is defined as: To *transfer* to another. To pass or transmit the title to property

b. At 82 Wn.App. 374 - " ... To *transfer* property or the title to property by deed, bill of sale, or instrument under seal. Used popularly in sense of "assign", "sale", or "*transfer*."

3. "... the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the

property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or incumbrancers with notice.' This statement of the law is in harmony with [55 P. 37] universal authority, but we do not see that it can be made applicable to appellant's interest in this case, for the statement assumes the very question which is in dispute here, viz. whether or not the party promised to convey or assign or transfer this property as security. It is the intention of the parties to the contract which is to be determined from the phraseology of the instrument." *Hossackv. Graham*, 55 P. 36, 20 Wash. 184,188 (Wash. 1898)

4. Under the second alternative, the State must prove that Sant trafficked in stolen property. RCW 9A.82.050(1). To "traffic" in stolen property means to "sell, *transfer*, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, *transfer*, distribute, dispense, or otherwise dispose of the property to another person." RCW9A.82.010(19). *State v. Sant*, 37668-7-11(Div. 11 2009)

5. Other jurisdictions agree gift transfers or transfers

without substantial consideration inuring to the benefit of the principal violate the scope of authority conferred by a general power of attorney to sell, exchange, *transfer*, or convey property for the benefit of the principal. *E.g.*, *Shields v. Shields*, 200 CaLApp.2d 99, 19 Cal.Rptr. 129 (1962); *Aiello v. Clark*, 680 P.2d 1162 (Alaska 1984); *Fierst v. Commonwealth Land Title Ins. Co.*, 499 Pa. 68, 451 A.2d 674 (1982); *Gaughan v. Nickoloff*, 28 Misc.2d 555, 214 N.Y.S.2d 487 (1961); *King v. Bankerd*, 303 Md. 98, 492 A.2d 608 (1985). *Bryant v. Bryant*, 882 P.2d 169, 125 Wn.2d 113, 118-19 (Wash. 1994).

6. The writ commanded the bank not to pay any debts to the Knapps and "not to deliver, sell, or *transfer*. or recognize any sale or of, any personal property or effects of the Defendant in your possession or control .. " *Fireman's Fund Ins. Co. v. Northwest Paving and Canst. Co., Inc.*, 891 P.2d 747, 77 Wn.App. 474, 478 (Wash..App. Div. 3 1995)

The word "transfer" is synonymous, in Washington State, with "sale" and "convey".

Plaintiff admits that there was no "sale" of the molds to Plaintiff and that ownership remains with the Defendant. (CP 242/lines 13-17).

Defendant submits that if “transfer” in the Court’s Order is admitted to not be a sale or conveyance, then an ambiguity exists. The word “transfer” must be interpreted.

C. **AMBIGUITY** - Extrinsic Evidence of the meaning of "TRANSFER"-
Consider all the Circumstances.

1. The question in this case involves interpretation of the indemnity clause contained in the Hazardous Waste Agreement.

Indemnity agreements are interpreted like any other contracts, *Jones v. Strom Constr. Co.*, 84 Wash.2d 518, 520, 527 P.2d 11]5 (1974), and the touchstone of the interpretation of contracts is the intent of the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 663, 80) P.2d 222 (1990); *Bonneville Power Admin. v. Washington Public Power Supply System*, 956 F.2d 1497,1505 (9th Cir.1992) (applying Washington law). Therefore, **the intention of the parties must be the starting point for the interpretation of the indemnity agreement. See *Scruggs v. Jefferson County*, 18 Wash.App. 240,243, 567 P.2d 257 (1977) (indemnity provision construed to effectuate intent of the parties); *McDowell v. Austin Co.*, 105Wash2d 48, 53, 710 P.2d 192 (1985) (indemnity agreements enforced according to intent of parties). **In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement, but also from "viewing the contract as a whole, the subject matter and objective of the contract, all the****

circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 421 (1993) (Emphasis added)

2. General principles of contract law govern settlement agreements. *Lavigne v. Green*, 106 Wn.2d 12, 20, 23 P.3d 515 (2001). In construing a contract, this court first looks to the language of the agreement. *Hadley*, 60 Wn.App. at 438. The parol evidence rule bars the admission of extrinsic evidence "to add to, subtract from, vary, or contradict written instruments which are contractual in nature, and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake." *Bond v. Wiegardt*, 36 Wn.2d 41, 47, 216 P.2d 196 (1950). (Emphasis added)

3. If the writing was not intended to be complete, evidence of additional terms is admissible. *Univ. Prop. • Inc., v. Moss*, 63 Wn.2d 619, 621, 388 P.2d 543 (1964). "People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing; and it is the court's duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not," *Id.* (quoting *Barber v. Rochester*, 52 Wn.2d 691, 698, 328 P.2d 711 (1958)).

4. The touchstone of contract interpretation is the parties' intent. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580,

844 P.2d 428 (1993). "**Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole. the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.**" *Stender v. Twin City Foods. Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 312 P.3d 976, 176 Wn.App. 185 (Wash.App. Div. 1 2013) at footnote 8. (Emphasis Added)

D. ALL THE CIRCUMSTANCES SURROUNDING THE

CONTRACT – *Stender*, supra 254 and *Trinity Universal*, supra footnote 8, Factors are considered. The rule is:

“Determination of the intent of the contracting parties is to be accomplished by viewing the **contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.**” (Emphasis added)

The portion of the License Agreement considered here is the combination of paragraph 5 from the License Agreement” with added phrase “transfer and/or deliver” from the Court Order.

The “the subject matter and objective of the contract” is the Licensing of Plaintiff and the objective of the contract is the sale of fishing devices.”

“[A]ll the circumstances surrounding the making of the contract” includes activities related to the fishing devices;

1. the years long inventive process of Defendant in inventing the devices,¹
2. the selection of the Plastic Injection Molding (PIM) company²,
3. the manufacture and obtaining of the molds³,
4. the discussions between Plaintiff and Defendant⁴,
5. the contact between Defendant and the injection mold company (Plastic Injection Mold or PIM)⁵,
6. the execution of the License Agreement on June 10, 2010⁶,
7. the relationship between Defendant and Plaintiff following execution of the License Agreement,
8. the events leading to a dispute between the Defendant and Plaintiff⁷,
9. the claims by Plaintiff of having been the inventor of the device⁸,
10. the extensive evidence of the Defendant’s years long inventive process⁹,
11. the absence of testimony that the Plaintiff had invented¹⁰,

¹ Defendant Mr. Osborn’s Declaration CP 180/line 18-25; 181/line 27-182/line 13; CP 234 Defendant Osborn Discovery Answer Under Oath to Question B-7, line 15 to CP 235/line 16; Reference to prototypes exhibits at CP 235/line 15-16 and prototype exhibits at CP 237-238.

² CP 181/line 27 to 182/line 17

³ CP 180/line 27 to 181/line 17

⁴ CP 227/3-230/16(pages 228, 229 were blurred as filed and are in the appendix.)

⁵ CP 181/27-182/line 2

⁶ CP 173

⁷ CP 153/lines 6-11; CP 182/24-183/3;

⁸ CP 194/line 8-195/line 3; CP 107; CP 104 last line to CP 105;

⁹ See footnote 1

¹⁰ See footnote 6

12. the finding of the Arbitrator that the Plaintiff had made no inventive contribution¹¹,
13. the relationship between the Plaintiff and PIM following the Arbitration¹²,
14. the efforts of the Plaintiff to remove the molds from PIM¹³,
15. the decision of the Plaintiff to not provide detailed reporting of sales to the Defendant¹⁴,
16. the credibility of the Plaintiff¹⁵.

The *Stender* factors, supra 254, for this Plaintiff and Defendant are revealed in the Clerks Papers comprised in part of Arbitration pleadings including 1. Plaintiff and Plaintiff's counsels Declarations; 2. The Arbitration Decision; 3. The Defendant's Declaration. The view of these pleadings in revealing the *Stender* Factors is not a rehash of the Arbitration. The process specifically considers evidence extrinsic to the License Agreement as revised by the Court relating to the "USE" of the molds by the Plaintiff.

The *Stender* process, supra 254, is labor intensive.

The time frame and events included in this examination extends from the earliest activity through and including "...the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective

¹¹ See Footnote 6

¹² CP 110/19-24

¹³ CP 110/19-112/6

¹⁴ CP 182/24-183/line 3.

¹⁵ See Footnote 6; CP 233/11 – 236/2

interpretations advocated by the parties.”

Defendant has filed with the Superior Court and now with the Court of Appeals via the Clerk’s Papers most pleadings and argument derived from the Arbitration. Portions of the pleadings relate to the credibility of the Plaintiff.

Commencing at CP 161: Osborn invented and patented a fishing device and filed an additional Patent Application for an improvement of the fishing device. On May 6, 2010 Osborn and Burrill entered into a License Agreement whereby Burrill would sell the original and improved Device. The Plastic Injection Molds (hereafter Molds) by which the Device is made are addressed in the License Agreement¹⁶ as follows:

5. LICENSOR has paid for the manufacture of the initial prototype units and the injection molds in China. Upon receipt of the injection molds from China, LICENSEE shall have the right to the full, unrestricted use of the injection molds during the term of this AGREEMENT.

The Molds are assets of Defendant. Title to the Molds is in Defendant.

a. DISPUTE: A dispute occurred between Defendant and Plaintiff and was arbitrated with an Arbitration Decision¹⁷ entered May 2, 2013.

The Arbitrator's decision regarding the Molds was as follows:

The Claimant (Burrill) is entitled to full, unrestricted use of the injection molds throughout the duration of the Contract;

¹⁶ CP 14 Paragraph 5

¹⁷ The Arbitrator's decision is found at CP 49, Exhibit A appended to Plaintiff’s Attorney Smith's Declaration supporting the Motion for Remedial Sanctions.

The Arbitration Decision was reduced to a Spokane County Superior Court Judgment on June 7, 2013 in accordance with Counsel's Proposed Judgment, stating the following:

3. Seth Burrill Productions, Inc. shall have full, unrestricted use of the injection molds during the term of the License Agreement, and Rebel Creek Tackle, Inc. shall cooperate in the transfer and/or delivery of said molds as requested by Seth Burrill Productions, Inc.

The words/phrase "Rebel Creek Tackle, Inc. shall cooperate in the transfer and/or delivery of said molds" is found only in in the Judgment as entered. The words are not found in the License Agreement or in the Arbitration Decision. This phrase was added by Plaintiff's Counsel and included in the Judgment but without definition.

Thus the following consideration of "all the circumstances surrounding the phrase including "transfer" will include all circumstances from the negotiations between Defendant and Plaintiff from 2009 through November 15, 2013.

There has been consistent use, manufacturing and location of the Molds, from 2009 through the execution of the License Agreement in 2010 until sometime following November 15, 2013 when Plaintiff seized and removed the molds to a location unknown to Defendant. In September 2012, Defendant advised Plaintiff that Plaintiff was no longer a

sole licensee for the product. Following this Defendant had Fishing Devices made for Defendant's sales. Otherwise, all production for sales purposes had been undertaken solely for Plaintiff while production for experimentation had been undertaken solely for Defendant.

b. THE SINGLE MANUFACTURER OF THE DEVICE:

Plastic Injection Molding Inc., owned by Mr. Ken Williams, (hereafter PIM or Williams), was the sole manufacturer of the Device from the arrival of the molds in 2009 through a date following November 15, 2013. Plaintiff had a fishing device, separate from the Defendant's Fishing Device, manufactured at PIM prior to meeting Defendant. Plaintiff alleges that he told Defendant about PIM and that PIM would be desired as a manufacturer of the Defendant's fishing device.

Defendant worked with Williams and PIM for the development and manufacture of the fishing device. Defendant was at the PIM facility on frequent occasions from 2009 through 2012. Defendant, Mr. Osborn, discussed the fishing device with Williams and Williams devised the form of the fishing device suitable for plastic injection molding and for assembly and disassembly, packaging and shipping. Defendant, Mr. Osborn, and Williams frequently talked via telephone regarding the process of taking the fishing device from the prototype to a finished and commercial product. Defendant, Mr. Osborn, and Williams frequently

discussed, by telephone and in person, changes required of the Molds in order to eliminate a slippage problem occurring in the device during fishing. Williams and PIM are in the same local as Defendant, Mr. Osborn.¹⁸ Defendant, Mr. Osborn, has a trusting relationship with Williams. It was always understood by Defendant, Mr. Osborn, that with the extent of William's involvement in getting the fishing device to production, and with the close working and trusting relationship between Williams and Defendant, Mr. Osborn, that Williams would be the sole manufacturer of the device.

Defendant's attorney Ivey has known Williams for years and has frequently referred Patent Clients to Williams for consultation and injection molding services. Attorney Ivey has frequently talked with Williams regarding the Defendant's product. Attorney Ivey specifically communicated with Williams regarding the quantities of fishing devices produced for Plaintiff and concerning Mold changes required to cure Mold defects that caused fishing device slippage during fishing. Williams provided invoice and other production documents to Defendant that were eventually used in the Arbitration. Williams provided a Declaration of his involvement in manufacturing and gave testimony in the Arbitration.

¹⁸ Declaration of Defendant inventor, Mr. Osborn, CP 180.

c. BURRILL'S CREDIBILITY: Decades ago Defendants, Mr. Osborn and Mrs. Osborn, developed a fishing device¹⁹. The single prototype was lost in the weeds of Puget Sound. Osborn resumed development of the fishing device in 2005, following retirement. From 2005 through 2009 Osborn made more than 60 different prototype fishing devices including prototypes of the improved fishing device²⁰. The original fishing device was improved with the addition of a diverter that caused the fishing device to move to the side of the direction of stream flow or boat direction. The initial prototype of the diverter fishing device was made in 2005²¹ with others following into 2009. The initial diverter fishing devices were made and tested by Defendant, Mr. Osborn, prior to Defendant, Mr. Osborn meeting Plaintiff in about January 2009. The diverter fishing device was not revealed to Plaintiff at the initial meeting in 2009. Defendant, Mr. Osborn undertook additional testing of the diverter fishing device before inviting Plaintiff to view the diverter fishing device in operation in about February or March 2009. Plaintiff was unaware of the extent of prototype development and testing until the Contemporaneous Exchange of Discovery in the Arbitration that occurred

¹⁹ Defendant Mr. Osborn's Declaration CP 180/line 18-25; 181/line 27-182/line 13; CP 234 Defendant Osborn Discovery Answer to Question B-7, line 15 to CP 235/line 16; Reference to prototypes exhibits at CP 235/line 15-16 and prototype exhibits at CP 237-238.

²⁰ See footnote 7

²¹ See footnote 7

in early 2013²².

However, in the 2012 filing of the Arbitration Demand²³ Counsel for Plaintiff asserted that Plaintiff, Mr. Burrill was an or the inventor of the diverter Fishing Device. Counsel for Plaintiff states in Counsel Chris Lynch's Declaration²⁴ of April 29, 2013 paragraph 4 that he, Lynch, had suggested to Plaintiff that he, Plaintiff was a co-inventor. Counsel Ivey's Motion for Reconsideration²⁵ of April 26, 2013 and Responsive Memorandum of April 30, 2013²⁶ fleshes out the Circumstances revealed during the Arbitration which compel the conclusion that Plaintiff has the intentions to conduct fraudulent accounting and reporting and hence underpayment of royalties.

On the day of Contemporaneous Exchange of Discovery in the Arbitration, Counsel for Plaintiff and Counsel for Defendant contemporaneously exchanged discovery. A limited portion of Plaintiff's Discovery Production²⁷, pertaining solely to Plaintiff, Mr. Burrill, claim of inventing the improved diverter fishing device, is attached. A limited

²² See footnote 7.

²³ Arbitration Demand attached as Exhibit 3, CP 188.to Defendant's Memorandum.

²⁴ Declaration of Chris Lynch, April 29, 2013 attached as Exhibit 4., CP 198.

²⁵ Defendant's Motion for Reconsideration of April 26, 2013 as Exhibit 5, CP 205.

²⁶ Defendant's Reply Memorandum of April 30, 2013 attached as Exhibit 6. CP 223.

²⁷ Limited portion of Burrill's Discovery Production attached at Exhibit 7, CP 226.

portion of Defendant's Discovery Production²⁸, pertaining solely to Mr. Osborn's prototype development of fishing devices and the improved diverter fishing device is attached as Exhibit 8 showing, by marking arrows, 11 examples of Diverter Fishing Devices developed by the Defendant prior to meeting the Plaintiff, Mr. Burrill

The Court's attention is drawn to Exhibit 7 and Plaintiff, Mr. Burrill's unqualified declaration that he was the inventor of the diverter fishing device. Plaintiff, Mr. Burrill declared that he gave the idea and guidance to Defendant, Mr. Osborn for the making of the diverter fishing device. Plaintiff, Mr. Burrill's Declaration predates his viewing of the multitude of Diverter Fishing Devices made by Defendant, Mr. Osborn before meeting Plaintiff, Mr. Burrill.

The Court's attention is drawn to Defendant, Mr. Osborn's production of photographs of fishing devices, as early as 2005 and four years before meeting Plaintiff, Mr. Burrill, which display the "diverter" extending from the main fishing device body.

The Court's attention is drawn to Defendant, Mr. Osborn's Discovery statement describing the invention and development of the "diverter" fishing device.

Following the contemporaneous exchange of discovery, Plaintiff,

²⁸ Limited portion of Osborn's Discovery Production attached at Exhibit 8, CP 233.

Mr. Burrill's claim of any role in inventing was addressed in a Motion for Summary Judgment. Plaintiff, Mr. Burrill's claim of being the sole inventor was revised to a role of having invented a particular angular setting.

In the Arbitration Decision, the Arbitrator held that Plaintiff, Mr. Burrill made no inventive contribution. The Arbitrator's holding is an implicit finding that Burrill's assertions were without credibility. The Arbitrator's holding "That neither Claimant [SBPI] nor Mr. Seth Burrill(Plaintiff) made an inventive contribution to the technology of U.S. Patent Application No. 12,641,291, and neither is a co-inventor;" is found at page 1 of Exhibit A to the Declaration, (CP 54-108), of Jeffrey R. Smith in Support of Plaintiff's Motion for Remedial Sanctions (Contempt) and other Relief as filed in this matter on or about October 15, 2013. The Arbitrator's holding is an implicit finding that Plaintiff, Mr. Burrill, is a liar.

d. BURRILL'S INTENTION: Burrill is bound by the License Agreement to make quarterly sales reports and quarterly royalty payments. The reports, from the first report, identified sales by customer name with sales details provided for each customer reported. Defendant is aware of sales not reported by Plaintiff. In Arbitration, Plaintiff, Mr. Burrill, testified that his attorney, Mr. Joseph Carroll, advised him that he was not

obligated to report these details and that subsequent reports would not provide these details.

Plaintiff's, Mr. Burrill, intent is to remove the Molds from Osborn and to deprive Osborn from any contact with a new plastic injection molding company and hence to deny Defendant any manufacturing data.

In ages past homestead claims were described in Patents. These claims were subject to the hazard of claim jumpers. The individuals proving the claim were deprived of the fruit of their labors. Plaintiff, Mr. Burrill is a "claim jumper". Plaintiff, Mr. Burrill intends to maintain two sets of books: One for the "no detail" report to Defendant but with a diminished royalty check; A second set of books will be the record of actual manufacturing and sales. The increased likelihood of Plaintiff, Mr. Burrill, being positioned to not report all sales will additionally reduce the value of the Patents and License Agreement. This will deter others from having an interest in investing in the Defendant's Corporation.

Plaintiff, Mr. Burrill, is a liar. He has shown his hand by claiming to be the inventor of the improved diverter fishing device, by intending to provide no sales details and by intending to deprive Osborn of any contact with the manufacturer for production data.

e. DEFINING "TRANSFER" BY ALL OF THE CIRCUMSTANCES:

1. PIM and Williams were recommended to Osborn by Burrill in 2009.
2. PIM and Williams manufactured a different fishing device for Plaintiff, Mr. Burrill.
3. Plaintiff, Mr. Burrill trusted and relied upon PIM and Williams.
4. The Molds have been at PIM with Williams and all manufacturing of the fishing device has been done at PIM from 2009 until a date after entry of the Court's Order in November, 2013. Thereafter Plaintiff removed the molds from PIM to an undisclosed location.
5. Defendant is located in the local of PIM, has been at PIM many times, knows and has collaborated with Williams in developing the Molds.
6. When Defendant, Mr. Osborn tested the fishing device and determined that slippage was occurring during fishing, Williams developed the method of adjusting the Molds and performed the adjustment.
7. Williams has always been accessible to Defendant, Mr. Osborn for discussion of and action required relative to the Molds.
8. Williams has at all times made production records available to Defendant, Mr. Osborn relative to each part of the fishing device.
9. Williams and PIM have been in business for many years.
10. Plaintiff's counsel's statement that "Plaintiff simply desires transfer of the plastic injection molds so it may use a company in which it has confidence to produce its product without interference from Defendant"

flies in the face of Burrill's recommendation of PIM and Williams and emphasis Plaintiff's, Mr. Burrill's intention of depriving Defendant of production data and committing fraud in quarterly reporting. Plaintiff, Mr. Burrill makes no criticism of the quality and timeliness of PIM's performance but substantiates Plaintiff's intention to complete "claimjumping" through use of a double set of books. Plaintiff, Mr. Burrill, in past quarterly sales reports, failed to reveal sales made to commercial customers where such sales were known to Mr. Osborn.

11. The definition of "transfer", considering all the circumstances, should be to retain all the conditions existing since 2009 with the exception of Ordering that there be no fishing devices manufactured except for Plaintiff at Plaintiff's instructions thereby retaining the Molds, which are the property of Defendant, in circumstances known and relied up by Defendant and thereby reducing the opportunities for Plaintiff to fraudulently hide sales and avoid making royalty payments.

12. Should Plaintiff be allowed to remove the Molds from PIM either to Plaintiff's possession or to another plastic injection molding company, the limitations should meet the circumstances existing at the time of the making of the contract including; 1. location at a local equally available to Defendant as was PIM, 2. a company having recognition in the industry for quality, 3. where communications are assured relative to the safety,

security, insurance and condition of the Molds, 4. the enforceable ability to communicate regarding flaws detected in the fishing device requiring Mold adjustment, 5. the enforceable ability to communicate and freely and accurately receive production data re: the dates and quantities of all pieces manufactured, 6. the assurance of being advised of the location to which the production is transported or shipped, 7. the reporting by each of Plaintiff's Customers with detailed reporting of all parts sold showing dates and sales prices, 8. the circumstances should also recognize, the evidence exhibited to this Court and as found by the Arbitrator, that Plaintiff, Mr. Burrill lied to the Arbitrator as a Tribunal leading to the conclusion that Plaintiff, Mr. Burrill intends and plans to fraudulently maintain records and fraudulently report sales and royalties.

13. Osborn must be assured of the ability to recover the Molds in the event of Plaintiff's default or breach or should Plaintiff become incapacitated or suffer death while Defendant is without sufficient records to identify and retrieve the Molds. Defendant must not be without protection should Plaintiff fail to pay any lien available to a new and unknown company. A default by Plaintiff relative to the new plastic injection molding company housing the thousands of pounds of steel comprising the plastic injection molds, without certainty of communications between Defendant and a new company has the likelihood of a result of destruction or sale of the

Defendant's property.

Additionally, Plaintiff's, Mr. Burrill intentions and credibility have been revealed by the Memoranda and Declarations presented by Counsel Chris Lynch for Plaintiff and by Counsel Ivey for Defendant during the Arbitration and recently by Counsel Smith on behalf of Plaintiff and by the testimony of the Plaintiff during arbitration.

II. Standard of Review of Order Holding Defendant in Contempt

Contempt rulings are reviewed for abuse of direction. An appellate court will uphold a trial court's contempt finding ' as long as a proper basis can be found.' Contempt of court includes any " intentional ... [d]isobedience of any lawful ... order ... of the court." RCW 7.21.010(1)(b). If the superior court bases its contempt finding on a court order, " the order must be strictly construed in favor of the contemnor and " the facts found must constitute a plain violation of the order." *Johnston v. Beneficial Mgmt. Corp. of America*, 96 Wash.2d 708, 713, 638 P.2d 1201 (1982) (emphasis added).

Argument - Contempt

Defendant contends that it has attempted to protect Defendant's corporate property in resisting the Plaintiff's demand to take all control of

Defendant's plastic injection molds. The injection molds are the Defendant's property. CP 242/lines 13-17. The issue is the definition of the "use" which Plaintiff is allowed and what the word "transfer" means from the Court's Order.

The injection molds have been placed in total control of the Plaintiff in accordance with the Order appealed from in this matter. CP 271-73; at 272 Defendant was ordered as follows "Rebel Creek Tackle, Inc. is hereby enjoined from further interference with the transfer of the molds, and the molds shall be transferred to SBPI immediately."

Plaintiff took the molds. Defendant has no awareness of the location, use or care of the molds. Defendant is wholly without knowledge of the molds.

The effect of Plaintiff's taking is the equivalent of a "sale" or "conveyance". "Transfer" in this state is equivalent to a "sale" or "conveyance".

In 1936 in *State ex rel. Gardner v. Superior Court for King County*, 56 P.2d 1315, 186 Wash. 134, 136-37 (Wash. 1936) Mr. Gardner was directed to appear to explain why he should not be held in contempt

for failure to comply with an Order.

The superior court has, of course, extensive jurisdiction in any case pending before it for the purpose of enabling it to protect corporate property against waste..." *Gardner*, supra 138.

It is no defense to a charge of contempt that the underlying ruling was erroneous. 15 Karl Tegland, *Washington Practice: Civil Procedure* § 43:3, at 203 (2nd ed. 2009).

However, the Court's Order, without definition per contract construction rules, is essentially the action allowed of a receiver by "RCW § 7.60.070. Turnover of property: Upon demand by a receiver appointed under this chapter, any person shall turn over any property over which the receiver has been appointed that is within the possession or control of that person unless otherwise ordered by the court for good cause shown. A receiver by motion may seek to compel turnover of estate property unless there exists a bona fide dispute with respect to the existence or nature of the receiver's interest in the property, in which case turnover shall be sought by means of an action under RCW 7.60.160 . In the absence of a bona fide dispute with respect to the receiver's right to possession of estate

property, the failure to relinquish possession and control to the receiver shall be punishable as a contempt of the court. “

Here the Defendant has presented a bona fide dispute. The property has been removed from any control of Defendant. The effect is that of a sale.

Defendant respectfully stated, in argument, that the Court’s action was in error seen at RP 28/line 13 to 32/line 21. Several obvious hazards were described to the Court in these comments. The same hazards are effectuated by not defining “transfer” in light of all the circumstances surrounding the agreement. These pages from RP 28/line 13 to 32/line 21 follow:

13 With due respect, Your Honor, I think that
14 it is error to not have considered -- to not
15 consider the documents filed, exhibits filed,
16 by Defendant in this case. I think it is an
17 abuse of discretion. I propose to the Court
18 that the Court's definition of transfer and
19 delivery is also done without an understanding,
20 without consideration of the circumstances
21 surrounding all of the factors in Scott
22 Galvanizing. The circumstances from 2009 to
23 the present, the subsequent acts of Mr. Burrill
24 and his conduct, and then the reasonableness of
25 this in destroying the commercial value, the

November 15, 2013

29

1 value to Rebel Creek of this property.
2 The entire effort here, and I am have not
3 been a part of this case from September 6 until
4 October 24 but the entire effort that has been
5 undertaken since that date has been to protect
6 the property value that is represented in these
7 molds. And so from that view that is
8 absolutely a justification to resist the action
9 of removing these molds from the present
10 location without limitations. If the
model(sic)[molds] are
11 to be removed from the present manufacturer in
12 order to preserve the property value, they must
13 be removed with directions that will -- that
14 will bind a subsequent plastic injection
15 manufacturing company, will bind them, to have
16 the types of communications that are necessary
17 in order to allow the property value of these
18 molds to continues.
19 I think that -- that terms like that can
20 be set forth and I am confident that a list of
21 terms that I would provide to Mr. Smith will be
22 met with a list of terms provided as counter
23 terms and that we will not come to an agreement
24 probably, we might, and if we did, we could
25 present an agreed order and if we didn't, then
November 15, 2013

30

1 I think it would be appropriate for this Court
2 to hear and make a ruling.
3 But without the surrounding circumstances,
4 based on the rule of the law found in Scott
5 Galvanizing, without those limiting terms, then
6 we're gonna see that this property is lost.
7 And then so I think a matter of simply defining
8 transfer and delivery with the word transfer
9 absolutely correlated with and synonymous with
10 sale in this state, you combine that with the
11 word delivery and you have an even greater
12 distance from ownership, a greater distance

13 separating the ownership properties -- the
14 ownership elements and attributes from the
15 Osborns and from Rebel Creek.
16 So I do believe that there has to be some
17 limiting factors that are put into place that
18 will protect the property value and that effort
19 to bring that kind of -- those kind of
20 limitations to bear in the matter of
21 transferring to a different company, those
22 support, the -- the problem in getting a
23 removal of these items from the present
24 location.

25 I'm just thinking how it would go. I have
November 15, 2013

31

1 had clients with their products, their molds,
2 in China during the earthquakes when the
3 earthquake finished there was no molds left.
4 I'm wondering what happens here with regards to
5 insurance. What is the nature of the company
6 that would be proposed by Mr. Burrill?
7 What would be the circumstance if the
8 payments were not made? And that's been a
9 history, it is not in the record with this
10 Court, but that has been a history between Mr.
11 Burrill and the present holder of the molds.
12 Would there be a lien? Will that lien be
13 enforced in some way? Would there be a sale of
14 those molds without any opportunity by Rebel
15 Creek to come in to protect that property
16 interest?

17 So really without the circumstances here
18 that give the property owner rights of
19 understanding of what's happening, we're gonna
20 have a -- we're gonna have property destroyed.
21 And I do believe that this would then
22 be -- that the Court in this instance will have
23 defined transfer and delivery to mean Seth
24 Burrill Productions, Inc. drives a truck up to
25 the front door of PIM, 2000 pounds of steel is
November 15, 2013

32

1 loaded in and that truck is driven off to a
2 place that is unknown to Rebel Creek. It is
3 unknown unless we have a court order here that
4 will bind that third party, that injection
5 molding company, to make these communications
6 with the owner.
7 So my thought about this definition of
8 transfer and delivery, that it ignores the
9 requirements of Scott Galvanizing and with due
10 respect I think it is error and abuse of
11 discretion. But I do assert that this is the
12 reason, the rationale, for having not simply
13 said: Bring your truck down, pick these things
14 up. It is a matter of protecting property, it
15 is not -- it is not contemptuous of the Court's
16 order. It is a willful act on the part of the
17 owners but it is not a act of contempt. It is
18 an act to obtain the kind of definition that is
19 a required to assure that the property value is
20 not lost.
21 Thank you, Your Honor.

Defendant respectfully requests the Court of Appeals to reverse the
trial Court Judgment of Contempt and to vacate the award of attorney fees
re: contempt.

III. Standard of Review re: Finding Of Fact/Conclusion of Law

A.First Citation: Finally Mr. Ross challenges finding of fact 12.
This finding goes to the credibility of Mr. Enstad's testimony. Our
standard of review requires us to accept the fact finder's view on

credibility of the witnesses. *See Freeburg v. City of Seattle*, 71 Wash.App. 367, 371-72, 859 P.2d 610 (1993). . The trial court was in a better position to evaluate the credibility of witnesses and we will not substitute our judgment for the trial court when reviewing findings of fact. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wash.2d 364, 369-70, 798 P.2d 799 (1990). *Noble v. A & R Environmental Services, LLC*, 164 P.3d 519, 140 Wn.App. 29,34 (Wash.App. Div. 3 2007).

B.Second Citation: The trial court did not abuse its discretion in awarding Hougan the 44th Avenue property, with Lang receiving \$2,877 as one half the reduction in principal. Lang does not suggest a standard of review. He has failed to assign error to the trial court's finding of fact that Hougan provided the down payment, and this unchallenged finding is a verity on appeal. *See Noble*, 114 Wash.App. at 817, 60 P.3d 1224. *Lang v. Hougan*, 150 P.3d 622, 136 Wn.App. 708 (Wash.App. Div. 2 2007). *Lang v. Hougan*, 150 P.3d 622, 136 Wn.App. 708, 719 (Wash.App. Div. 2 2007)

C.Third Citation: "It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal."^[28] This Court will review only findings of fact to which error has been assigned.^[29] The

challenged findings will be binding on appeal if they are supported by substantial evidence in the record.^[30] "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding."^[31] *In re Contested Election of Schoessler*, 998 P.2d 818, 140 Wn.2d 368, 385 (Wash. 2000). *Dumas v. Gagner*, 971 P.2d 17, 137 Wn.2d 268, 280 (Wash. 1999) ☐

D. Fourth Citation: Vail assigns error to the commissioner's findings of fact 4, 5, 6, 7, 9, and 10.^[4] But Vail does not argue that substantial evidence does not support each finding. Instead, Vail argues that the commissioner should have found misconduct. Because substantial evidence supports each finding of fact, the commissioner did not err.

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the ESD commissioner. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). We sit in the same position as the superior court and apply the APA standards directly to the administrative record. *Verizon*, 164 Wn.2d at 915. We review the decision of the commissioner, not the ALJ's underlying decision. *Verizon*, 164 Wn.2d at 915.

We review the commissioner's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wn.App. 859, 864, 173 P.3d 934 (2007). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d at 553. We neither weigh creditability of witnesses nor substitute our judgment for the agency's. *Brighton v. Dep't of Transp.*, 109 Wn.App. 855, 862, 38 P.3d 344 (2001). Our review of disputed issues of fact is limited to the agency record. RCW 34.05.558.

E.Fifth Citation: As "[t]he party claiming error," Morcos Brothers has "the burden of showing that a finding of fact is not supported by substantial evidence." *Fisher Properties, Inc v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (citing *Leppaluoto v. Eggelston*, 57 Wn.2d 393, 401, 357 P.2d 725 (1960)). Evidence is substantial when it "would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *Shelden*, 68 Wn. App. at 685 (quoting *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 81, 492 P.2d 1058 (1971), *review denied*, 80 Wn.2d 1010 (1972)). If substantial evidence supports a

trial court's findings of fact, we "must treat them as verities." *Ferree v. The Doric Co.*, 62 Wn.2d 561, 568, 383 P.2d 900 (1963); see *Miles v. Miles*, 128 Wn. App. 64, 69, 114 P.3d 671 (2005).

"[I]t is a firmly established rule" that when substantial evidence supports the trial court's findings, appellate courts "will not retry factual disputes [] on appeal." *Ferree*, 62 Wn.2d at 568. The trial court is in a better position to weigh the evidence and to assess witness credibility; thus, appellate courts "will not substitute their judgment for that of the trial court" on issues of weight and credibility.^[5] *Fisher* 115 Wn.2d at 369-70 (citing *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980)).

F.Sixth Citation: In applying that definition to the facts at hand, it is clear that whether the plaintiff had provided new cinders would be a finding of fact. However, whether the replacement of the cinders constituted a "cure" is a determination of the legal effect of that action and is thus a conclusion of law. ^[5] Therefore, the pertinent standard of review is whether the conclusion of law, that a cure resulted, is supported by the evidence.

McClendon v. Callahan, supra. *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 584 P.2d 968, 21 Wn.App. 194, 197 (Wash.App. Div. 2 1978)

Argument-Finding of Fact/Conclusion of Law

If the Court's comment is a finding of fact then, if unchallenged, it is a verity. In this instance a challenge is made. The foregoing law and argument regarding ambiguity and definition is incorporated. Substantial evidence is not shown. The Court of Appeals is urged to find that the indicated reference is not a Finding of Fact.

If a Conclusion of Law then the pertinent standard of review is whether the conclusion of law, that a cure resulted, is supported by the evidence. The foregoing law and argument regarding ambiguity and definition is incorporated. Substantial evidence is not shown. The Court of Appeals is urged to find that the indicated reference is not a Conclusion of Law.

IV. Attorney Fees: Rule 18.1. ATTORNEY FEES AND EXPENSES

Defendant requests attorney fees and expenses pursuant to COA Rule 18.1.

Argument – Attorney Fees

1. As described in the foregoing substantive arguments, Defendant spent years in experimentation, design and testing of fishing devices

before meeting Plaintiff. Plaintiff, in the Demand for Arbitration, in Contemporaneous exchange of Discovery, in subsequent Declarations claimed to have been the inventor. Plaintiff also stated that a new royalty reporting system would be implemented where Defendant would have no audit capability to determine the accuracy of sales. Plaintiff, without definition of “transfer” brought the Motion for Contempt, removed the molds from control or knowledge of Defendant of the whereabouts of the molds. These acts comprise bad faith. The acts describe matters of contract and contract interpretation supporting “bad faith” per RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (emphasis added) (quoted in part in BLACK'S LAW DICTIONARY 159 (9th ed.2009)). Thus, at least where a party owes some duty analogous to a contractual obligation, negligence or gross negligence suffices to support a finding of bad faith. *Francis v. Washington State Dept. of Corrections*, 313 P.3d 457, 178 Wn.App. 42 (Wash.App. Div. 2 2013); also see

The recitation of facts challenging Plaintiff’s credibility are relied upon here to support a finding of “Bad Faith” and the basis for an award of attorney fees and expenses on this Appeal.

Respectfully submitted this 26th day of May, 2014.

A handwritten signature in black ink, appearing to read "Floyd E. Ivey". The signature is written in a cursive, flowing style with some loops and flourishes.

Floyd E. Ivey, WSBA 6888, Attorney for Defendant